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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-540

WILLIAM A. MOORE, ET AL.,

....PETITIONER

V.

HAMPTON ROADS SANITATION DISTRICT COMMISSION

AND

CITY OF NEWPORT NEWS,

....DEFENDANTS

PETITION FOR WRIT OF CERTIORARI

APPEALED FROM THE FOURTH CIRCUIT
COURT OF APPEALS
RICHMOND, VIRGINIA

WILLIAM MILLS KRIEGER, ESQUIRE
714 J. CLYDE MORRIS BLVD.
NEWPORT NEWS, VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

WILLIAM A. MOORE et al.,
.... Petitioner,

v.

HAMPTON ROADS SANITATION DISTRICT
COMMISSION, and
CITY OF NEWPORT NEWS,
.... Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia, on a judgment n.o.v. dated March 10, 1975 is unreported, appendix page . The Fourth

Circuit panel decision and the decision en banc is reported at 557 F.2d 1030 (4th Cir. 1976).

JURISDICTION

Jurisdiction is founded upon Title 28 Section 1254 of the United States Code. Petitioners seek review of the Judgment n.o.v. entered in favor of the City of Newport News and the directed verdict in favor of Hampton Roads Sanitation by Court Order dated March 10, 1975.

QUESTIONS PRESENTED

I.

Whether interference with commercial fishing operations on navigable waters of the United States bears a significant relationship to traditional maritime activity and is thus a maritime tort?

II.

Whether the fact that the fish resources

subject to commercial fishing operations in navigable waters of the United States are owned by the Commonwealth is a sufficient basis to oust the admiralty from its traditional jurisdiction over commercial fishing operations.

III.

Whether the contamination and condemnation of the Warwick River constituted an unconstitutional taking within the purview of federal and state constitutional standards.

CONSTITUTIONAL PROVISION AND STATUES INVOLVED

Constitution of the United States

Amendment V

...nor shall private property be taken for public use, without just compensation.

Amendment XIV, §1

All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia

Article I§11

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, not any law whereby private property shall be taken or damaged for public uses, without just compensation, the term public uses to be

defined by the general assembly.

Statutes

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws,or treaties of the United States.

28 U.S.C. §1333

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

The petitioners claim jurisdiction under 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1333 (admiralty and maritime jurisdiction).

The petitioners are lessess of oyster

beds located in the Warwick River, a navigable tidal stream, contiguous with the City of Newport News, Virginia. The leases are granted from the Commonwealth for a nominal price, are automatically renewable and are treated as chattels real by state law. The lessee spends substantial amounts of money in shelling and seeding his leased beds so that oysters may be cultivated, harvested and sold. The petitioners' beds were condemned for shellfishing at different times and as to different portions of the river since March 1, 1966 when the northern Warwick was condemned because of high coliform counts. (This includes the grounds of M.G. Lozaw, Byrncliffe Oyster Co. and part of Carrie Carters). The southern portion of the Warwick was closed in 1967 when the outflow pipe of the James River Sewage Treatment Plant

started operation and a "buffer zone" was created pursuant to FDA requirements. The remainder of the River was closed on the 29th day of March, 1972, because of high coliform counts.

The FDA, since the early 1920's has required that certain areas around sewage treatment plant outflow pipes be permanently condemned for shellfishing purposes. These areas are "buffer zones" which provide a margin of safety should the plant suffer a breakdown. The 1967 closing of the Warwick was the result of the creation of such a "buffer zone" for the James River Sewage Treatment Plant. The oystermen contend that they should have been compensated for the loss of their grounds when the "buffer zone" was created. It was the failure to be compensated which led to the claim against the HRSDC, owner and operator of the JRSTP. The lessees alleged that the failure to compensate them was a taking of their property without due process of law. The court below granted HRSDC summary judgment on this issue. The circuit affirmed as HRSDC.

The leaseholders' case against the City of Newport News involved different leases in different sections of the River which were permanently closed because of real contamination. The northern section of the River has remained permanently condemned since March of 1966 because of the presence since that time of consistently high fecal coliform counts. The middle section of the River has remained permanently condemned since March of 1972 for the same reasons. The evidence presented by the lessees demonstrated that the source of the coliforms were City pumping stations and lateral sewage conduits.

It was also accepted by the jury that City negligence permitted the sewage flow into the Warwick and was the proximate cause of the continuing condemnation. The evidence presented showed that for various correctable reasons the City sewer facilities drained raw sewage into the Warwick every time it rained and at other times. The Court below granted judgment n.o.v. as to the City on three grounds. The City was not guilty of taking the property of the lessees without due process requirements being met. The City enjoyed sovereign immunity from sewage related torts. The lessess failed to notify the City of their tort claim within sixty (60) days after the claim arose. The Circuit panel reversed on grounds of admiralty jurisdiction with respect to Newport News, but en banc affirmed.

SUMMARY OF ARGUMENT FOR ALLOWANCE OF WRIT

The Fourth Circuit Court of Appeals in the case at hand has refused to apply the test of maritime jurisdiction as enuciated in Executive Jet Aviation v. Cleveland, Ohio 409 U.S. 249 (1972). Executive Jet and lower courts have indicated that where a wrong bears a significant relationship to traditional maritime activity, admiralty jurisdiction exists. Union Oil Co. v. Oppen, 501 F.2d 558, 560-6B (9th Cir. 1974); Kelly v. Smith, 485 F.2d 520 (5th Cir. 1970). Here the activities of oystering were banned as a direct result of the negligent acts of Newport News. The Fourth Circuit examines only cultivation. They place it in a vacuum. They then find that cultivation is a local concern while ignoring the overall nexus the wrong has to the traditional maritime activity of oystering.

The ban is on the harvesting of oysters. This, in effect, denies the petitioner the ability to engage in maritime commerce. By polluting the waters of a navigable river, the defendants interfered with the entire business of oystering. The damage-the crux of the injury is to the commerce of the seas.

The Circuit further departs from typical maritime jurisdiction analysis by indicating that because a traditional maritime activity has local connections it cannot provide the basis for maritime jurisdiction. The federal government has not ceded maritime jurisdiction because a matter is of local concern. The whole basis for admiralty is that uniform redress of maritime wrongs is sounder policy than local variances for those who are engaged in navigation and commerce of the seas. See Workman v. City of New York, 179 U.S. 552 (1900).

The lower courts locality reasoning is based on an archaic notion of commerce derived from McCready v. Virginia, 94 U.S. 391, 395 (1877). This Court just last term discredited McCready with respect to its view of commerce. See Douglas v. Seacoat Products, Inc. 45 L.W. 4491(1977) ft. nt. 16. Commerce was interpreted in a much more limited sense than used today. Perez v. United States,402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111. Yet this antiquated view of commerce is the entire underpinning of the opinion by the Fourth Circuit.

Even the application of the Commerce clause to this factual situation is mistaken. The Fourth Circuit indicates that an otherwise maritime tort is of only local concern because Congress does not have the power to regulate fishing

activities based on a McCready nation of commerce. There is no reason to thrust an interstate commerce pronouncements in to the field of maritime commerce. Where the tort has a nexus to commerce of the seas, interstate or otherwife, the Constitution confers maritime jurisdiction to the federal courts.

Moore v. Hampton Roads Sanitation, 557 F.2d 1030 (4th Cir. 1977) presents an admiralty issue of great importance coming out of a Circuit where the oyster industry is prevelant. The opinion has far reaching effects not merely on the oyster industry, but for the entire fishing industry.

The contamination of the Warwick River by the City of Newport News was clearly an unconstitutional taking. The district court felt that there was,at best,only a negligent impairment of the petitioner's interest. The difference between an "impairment" and a taking relates to the magnitude of the injury. Where the magnitude is great a taking occurs. The overflow totally deprived the oystermen of the use of their leasehold,warrantying compensation.

Hampton Roads is accountable for all the damage done to oysterland condemned adjacent to the sewage outflow line. Failure to provide compensation for all damage is contra to Supreme Court precedent. United States v. VEPCO, 365 U.S. 624(1961).

The courts below, in effect, overruled the holding in Darling v. Newport News, 123 Va. 14, 96 S.E. 307 (1918),aff'd, 249 U.S. 540 (1919); that there existed a common law right to dump sewage into tidal streams. Moore v. Hampton Roads, 557 F.2d 1030, 1033 (1976). This Court should clarify what effect this has on the utilization of the takings clause in

environmental pollution situations. The district court decision in the case at hand is not in align with lower court reasoning or Supreme Court precedent. The environmental considerations combined with the overruling of Darling make this an extremely important federal question.

ARGUMENT

1

OYSTER FISHING BEARS A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY, AND INTERFERENCE WITH THAT ACTIVITY OCCURRING UPON NAVIGABLE WATERS CONSTITUTES A MARITIME TORT.

Sweeping aside the rhetoric and confusion that had accompanied this case on its journey through the courts, one fact remains evident: it basically involves an action by oystermen against the City of Newport News and the Hampton Roads Sanitation District Commission to recover damages for the negligent destruction of the ability to pursue their fishing, or harvesting, their livelihoods. And the sole question here to be dealt with is whether interference with the pursuit of that livelihood, occasioned by the discharge of untreated sewage into navigable waters of the Watwick River, gives rise to a cause of action within the admiralty and maritime jurisdiction of the federal courts.

The starting point for determining whether a tort claim is within the admiralty jurisdiction is undoubtedly Executive Jet, supra. There, the Supreme Court put an unequivocal end to the strict locality test of maritime tort jurisdiction, replacing it with a requirement that the wrong, even though it occurs upon navigable waters, "...bear a significant relationship to traditional maritime activity." 409 U.S. at 268. In attempting to describe

what activities bear such a relationship to traditional maritime activity, the Court first focused upon matters pertaining to maritime navigation, stating:

> "The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules--rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe ...409 U.S. at 269-270.

But, the admiralty has obviously not been concerned only with the navigational facets of the shipping industry. As further stated by the Supreme Court:

> "Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes,

> limitation of liability, cargo damage, and claims for salvage." 409 U.S. at 270.

That these situations, including both maritime navigation and maritime commerce, were not intended to be all-inclusive is evidenced by the Court's immediately following observation that: "Rules and concepts such as these are wholly alien to air commerce..." 409 U.S. at 270, emphasis added. In short, Executive Jet altered only the strict locality rule of admiralty jurisdiction, and can in no way be interpreted as removing from that jurisdiction any matters historically related to either maritime navigation or commerce. Thus all such matters are today, as they were previously, within the admiralty jurisdiction.

The occurrence giving rise to the instant suit is the negligent release of untreated sewage into waters forming a part of petitioners' oyster beds, thereby

preventing the harvesting of oysters and their placement in interstate commerce. And, since that occurrence unquestionably had its adverse impact on navigable waters, the sole question left to be decided is whether it "...bears a significant relationship to traditional maritime activity." The activity interfered with is the seeding, fattening and harvesting of oysters; an activity carried out exclusively by the use of documented vessels manned with crews and which has as its purpose the capture of a species of marine life. The activity, in short, is fishing--different from any other types of fishing carried on in our coastal waters only in the method used in snaring the "catch", and in the fact that the oystermen assure a continuing supply of these shellfish by seeding the beds after they fish, or "harvest". To say that this conservation and supply-assuring procedure removes this type of shellfishing from the realm of commercial fishing is tantamount to saying that logging on previously cut and reseeded tracts is something other than logging. And, if it is admitted that what the petitioner oystermen do is fish for shellfish, it seems axiomatic that their activity has traditionally been of concern to admiralty courts and is maritime in nature. Thus, in Union Oil, supra the court noted that were it necessary to do so--which it concluded was not--it would have no difficulty in finding that the oil pollution of coastal waters interfering with commercial fishing activities constitutes a maritime tort because:

> "In numerous ways, the fishing industry is clearly a part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history. For example, fishermen have been treated as seamen for purposes of enforcing their rights against the fishing vessel and its owner...and the vessels themselves have been the object of federal legislation designed to afford their owners many of the benefits which the law otherwise provides to maritime vessels generally..."

A District Court in the Fourth Circuit recently embraced that reasoning. See Potomac River Association, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp 344 (D. Md. 1975). There, District Judge Young said:

> "Although dredging and filling are not traditional maritime activities, interpretation of Executive Jet indicates that the activity of the one injured, rather than the one injuring, must have a maritime nexus... That nexus certainly exists in relation to the Potomac River Association insofar as injury to commercial fishing has been alleged." 402 F. Supp at 358.

For similar post-Executive Jet authority, see Burgess v. M/V Tamano, 370 F. Supp 247 (D. Me. 1973); and State of Maryland, Department of Natural Resources v. Amerada Hess Corporation, 356 F. Supp 975 (D. Md. 1973).

Respondents have attempted to place this occurrence on the periphery of the admiralty's jurisdiction, arguing that the destruction of petitioner's commercial fishing activities was a fortuitous consequence of their negligent acts; and that such shell-fishing endeavors are, like the crash of the ill-fated airplane into the marshes of Lake Erie in Executive Jet, matters that were formerly deemed within the scope of the admiralty's jurisdiction solely because of their maritime situs. Nothing could be farther from the truth. First, while it might indeed be fortiutous for a land-based airplane traveling between two points within the continental United States to crash into navigable waters, the same cannot be said of releasing pollutants

into streams feeding into the Warwick River and ultimately emptying into the waters of the Atlantic Ocean. It is as foreseeable that such pollutants will find their way into navigable waters, and cause whatever harm they have the potential for causing in those navigable waters, as it is that night will follow day. And, whereas, the crash of the Executive Jet airplane had no bearing upon either maritime navigation or commerce, and could only come within the scope of the admiralty's jurisdiction is situs alone was jurisdictionally dispositive, the same is not true of commercial fishing activities. The vessels used in these endeavors and the personnel engaged in these activities have traditionally and historically been deemed within the admiralty's jurisdiction even where a conceptual, and not merely a spatial, test has been applied. Thus, furnishers of supplies to coastal fishing vessels have historically been afforded maritime liens; mortgagees of such vessels have been afforded preferred status pursuant to the Ship Mortgage Act; and members of the crews of such vessels have been entitled to recover for their illnesses and injuries pursuant to the maritime doctrines of maintenance and cure, seaworthiness, and the Jones Act, and have been afforded maritime liens for unpaid wages. See, for illustrative purposes, Osland v. Star Fish & Oyster Co., 107 F.2d 113 (5th Cir., 1939); Putman v. Lower, 236 F. 2d 561 (9th Cir., 1956); The Virginia Belle, 204 Fed. 692(E.D. Va. 1913); The Hiram Dixon, 33 Fed. 297 (E.D. N.Y. 1887); and W. F. Allen v. The M/V Contessa, 196 F. Supp 649 (S.E. Tex. 1961). It is significant that, even before Executive Jet, one whose claim was not conceptually within the ambit of the

of the admiralty's jurisdiction could not evoke any of the above remedies simply because the situs of his claim brought the matter within the admiralty's jurisdiction. Thus, while application of the strict locality test of tort jurisdiction occasionally worked before Executive Jet to bring swimmers within the jurisdiction of admiralty if they struck submerged pilings while emersed in navigable waters, no court applying the strict locality rule of admiralty jurisdiction ever permitted such a person to recover maintenance and cure or premise his action upon the maritime concepts of seaworthiness or Jones Act Negligence.[1] And, the supplier of the swimmer's bathing suit or snorkle gear most certainly did not possess a maritime lien! Those remedies, freely applied to all commercially fishing the inland and tidal waters, were reserved to persons engaged in or abetting maritime commerce or navigation and not extended to those who fortuitously were injured upon navigable waters while engaged in non-maritime pursuits. Thus, even before Executive Jet it was necessary that claims for these remedies be premised upon activities bearing a significant relationship to traditional maritime activities, and applying those standards, no court found such a relationship wanting in causes involving commercial fishing activities, whether shell fishing or fin fishing. There is nothing in Executive Jet, dealing as it does with a case that has always been on the periphery of the admiralty jurisdiction, to even

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[1] For a discussion of the now discredited strict locality rule of admiralty tort jurisdiction see Moore and Pelaez, 7A Moore's Federal Practice, ¶.325 (3);and Pelaez, Admiralty Tort Jurisdiction-The Last Barrier, 7 Duq. L.R.1 (1968).

remotely suggest that such traditionally maritime pursuits as fishing are today to be wrenched from that jurisdiction and subjected to a confusing and often conflicting maze of state laws. This case, as was true in In Re Motor Ship Pacific Carrier, 489 F.2d 152 (5th Cir., 1974), U.S. cert den 417 U.S. 931 (1974), another case dealing with interference to maritime commerce caused by smoke emanating from shore,

> "...(I)s not one of those 'border-line' problem cases, alluded to in Executive Jet, devoid of any relationship between the tort and traditional maritime activities other than location." 489 F.2d at 155.

but instead involves interference on navigable waters with an activity historically and traditionally of concern to the admiralty.

There is nothing in the post-Executive Jet decision to the contrary. Thus, this Circuit in Richards v. Blake Builders

Supply, Inc. 528 F.2d 745 (4th Cir.,1975) refused to exclude pleasure boats from the admiralty jurisdiction because, even though not involved in maritime commerce, they are vessels in navigation which have been deemed within the admiralty jurisdiction for a variety of purposes, noting:

> "Thus, in at least three instances, the Supreme Court has treated pleasure boats as being within the admiralty jurisdiction, without a suggestion of any doubt about the matter. Nor did the Court, in Executive Jet Aviation, cast any doubt about its own prior holdings. It did not include those cases within the group of motorboat cases of which it did express disapproval. Under those circumstances, we do not think we can read Executive Jet Aviation as having overruled the earlier cases in the Supreme Court, or even as reopening the whole general question for reconsideration in the lower federal courts." 528 F.2d at 749.

Similarly, there is not a scintilla of evidence in Executive Jet to indicate that Court's displeasure with the plethora of pre-existing decisions holding commercial fishing activities to be

legitimately within the concern of the admiralty, whether occurring in territorial waters or upon the high seas. As so astutely observed by this Court, Executive Jet dealth only with a matter of no traditional concern with either maritime navigation or maritime commerce, and only as to such matters did it conclude there was no maritime nexus. That decision cannot be read as excluding from the traditional jurisdiciton of the admiralty matters clearly pertaining to either maritime navigation or maritime commerce. If a relationship to either such activity is found to exist, admiralty--as always--must yet be deemed to have jurisdiction.

Senior Judge Field, dissenting on the panel decision, has suggested that "...the cultivation of oysters is not a traditional form of maritime commerce and navigation.." Moore, supra at 1035, sufficient to support admiralty jurisdiction. However, cultivating oysters--as is true of any other type of fishing enterprise--can only be done with the use of vessels and crews that historically have been deemed within the admiralty jurisdiction and subjected to the admiralty's substantive rules, regulations and laws. And, it is those historically maritime activities that are interfered with when negligently caused water pollution destroys oystering. The significance of a full recognition of the types of activities affected by the tortious conduct is illustrated in Kelly v. United States, 531 F.2d 1144 (2nd Cir. 1976) where the cause of action was based upon the Coast Guard's alleged failure to come to the rescue of pleasure boaters. That Court, troubled with the problem of including pleasure boats within the jurisdiction of the admiralty, refused to take the bait which would have compelled

it to resolve that question, recognizing that the real question was whether Coast Guard rescue operations bear a significant relationship to traditional maritime activities and not whether pleasure boats are within that jurisdiction. As stated by the Court:

> "We believe...that this suit is not merely a 'pleasure boat accident case.' In fact, the case only tangentially involves boats at all. It primarily involves water rescue operations. The objects of the rescue could just as well have been fatigued swimmers as capsized boaters. The critical question, therefore, is not, as both parties have tended to frame it, whether pleasure boat cases fall within admiralty, but rather rescue cases involving the United States Coast Guard fit within this category. Viewing the case in this way, we conclude that rescue operations of the Coast Guard conducted on navigable waters to in fact bear a significant relationship to traditional maritime activities for purposes of admiralty jurisdiction. 531 F.2d at 1147.

So, too, here it is of critical importance that petitioners interference with the cultivation of oysters also

also interferes with activities historically and traditionally within the scope of the admiralty's jurisdiction.

A factual situation virtually identical with the one at hand also coming out of the Eastern District of Virginia was presented by Robert R. Wilson v. United States of America, et al, Civil Act No. 76-28-N. District Judge Calvert Clark, in an unpublished opinion dated August 11, 1976, ruled the sewage polluting acs of the defendnat were maritime in nature. In that case it was alleged that inadequately treated sewage was discharged in the Lynhaven River and its tributaries causing closing of the area to commercial oystering. The Judge indicated that:

> "The sufficiency of the nexus between the alleged wrong and maritime activities is tested by an examination or the activities of the injured party. This was the approach utilized in Executive Jet Aviation and since adopted by several lower federal courts. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 272 (1972); Union Oil Company v. Oppen, 501 F.2d 558, 561 (9th Cir. 1974); Oppen v. Aetna Insurance Co., 485 F.2d 252, 257 (9th Cir. 1973); Potomac River Association, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp 344, 358 (D. Md. 1975). The plaintiffs are commercial oystermen who possess leasehold interests in certain oyster beds owned by the Commonwealth of Virginia. The oystermen cultivate and market oysters as a livelihood. In pursuing their occupation, the plaintiffs use vessels to travel the navigable waters of the Lynnhaven River System. Consequently, the plaintiffs are subject to the United States navigation regulations, 33 U.S.C. §154, et seq. The use of water-borne vessels on navigable waters is clearly a traditional maritime activity. St. Hilaire Moye v. Henderson, 496 F.2d 973, 979 (8th Cir. 1974). Robert V. Wilson, supra 8,9.

And, it is the harm caused by being prevented from undertaking the traditionally maritime activities of fishing for, or "harvesting," oysters, and placing them in interstate commerce, for which petitioners seek redress. Thus, that some facets of the oystering business may be outside the admiralty's jurisdiction is no more dispositive of whether the harm alleged in this case constitutes a maritime tort than would be the fact that a pleasure boat is outside the admiralty jurisdiction where the tort alleged involved the negligent performance of a Coast Guard rescue; or that a contract to build a vessel is outside the admiralty jurisdiction in determining whether the subsequent interference with that vessel's navigation constitutes a maritime tort. The sole relevant question in both the hypothetical situation and in the instant case is whether the tort adversely affected activity traditionally of concern to the admiralty and had its impact upon navigable waters. So long as the cultivation of oysters requires the use of ships and their crews, it involves maritime commerce. And interference with maritime commerce has traditionally

constituted a tort cognizable within the jurisdiction of the admiralty. A full examination of the scope of defendants tortious acts and the activities with which those acts interfered illustrates the accuracy of the observations of the majority of the Panel originally hearing this cause when it remarked:

> "Harvesting oysters and clams, like fishing, is a traditional maritime activity; the cultivation of oysters is so closely related to the harvesting of oysters that interference with cultivation which impairs harvesting also meets the situs and nexus tests established by Executive Jet."

II

THE POWER TO REGULATE MARITIME COMMERCE AND NAVIGATION IN VIRGINIA TERRITORIAL WATERS HAS NOT BEEN CEDED TO THE COMMONWEALTH OF VIRGINIA, AND REPOSES IN THE FEDERAL COURTS EXERCISING THEIR ADMIRALTY AND MARITIME JURISDICTION.

It has been clear since the Supreme

Court's decision in the Genesee Chief v. Fitzhugh, 12 How. 443 (1850) if not before, that all navigable waters used for purposes of maritime commerce and navigation are within the admiralty jurisdiction and that torts occurring thereon and having a relationship to traditional maritime activity are maritime. And, it makes no difference whether those waters are within or without the boundaries of any state.

There is nothing in Smith v. Maryland, 59 U.S. 71 (1855); McCready v. Virginia, 94 U.S. 391 (1876); Manchester v. Massachusetts, 139 U.S. 240 (1891); or in the Submerged Lands Act of 1953, 43 U.S.C. §1301, et seq., capable of supporting a conclusion that the admiralty has relinquished its long-standing jurisdiction over maritime torts occurring in territorial waters.

The cited cases deal with the validity of state statutues regulating coastal fishing in an effort to preserve resources held in trust by the states. Those decisions make it clear that the fish resources in the territorial waters are owned by the various states and that the states are free to promulgate and enforce regulations governing the capture of those resources. But, as stated by the Supreme Court in Manchester v. Massachusetts, supra,

> "...there is no necessary conflict between the right of the State to regulate the fisheries in a given locality and the right of the United States to regulate commerce and navigation in the same locality." 139 U.S. at p. 262.

Thus, while all of the cited cases--and numerous others--make it abundantly clear that states own and can control the methods of harvesting fish, the times when such fish may be harvested, the quantities and sizes of fish that can be harvested, etc., no decision has yet so much as hinted that this brings within the state's jurisdiction matters traditionally of concern to the admiralty simply because fishing in state territorial waters is involved. Thus, longshoremen and shiprepairers injured on vessels engaged in fishing territorial waters are not subject to state Workmen's Compensation Laws, but are embraced within the scope of the Longshoremens' and Harbor Workers' Compensation Act. And, the crews of territorial water fishing vessels are not limited to the benefit of state laws, but are clearly entitled to the protection afforded by the Jones Act and the general maritime law doctrines of maintenance and cure and seaworthiness--none of which remedies are afforded by the law of any state. Nor is there today any doubt that those furnishing supplies to vessels fishing the territorial waters, the

mortgagors of such vessels, and unpaid crew members serving aboard those vessels, are within the ambit of the Federal Maritime Lien Act and the Ship Mortgage Act, and not limited to state created rights.

All of this illustrates that while states do own the fish resources in their territorial waters, and have the power to regulate the harvesting of those resources for the common benefit, many aspects of that harvesting do not bear upon the state's ownership and regulatory powers, are of traditional concern to maritime commerce and navigation, and must yet be governed by uniform principles of admiralty law. The Fourth Circuit in the case at bar held that the interests of the plaintiff were purely local in their nature and, therefore, the impairment of their interests falls within the state jurisdiction and not admiralty. No authority whatsoever is cited for this view of tort jurisdiction. An analysis of Smith, Menchester, and McCready reveals the fallacy in the "locality reasoning" enunciated by Justice Field. It has long been settled that the states surrendered jurisdiction over admiralty matters. United States. United States v. Bevans. Justice Curtis in Smith v. Maryland described the limits of state power very clearly. Their power stops at the point where their jurisdiction conflicts with maritime jurisdiction. Before determining whether the interest is local, one must first determine whether the tort is within admiralty's jurisdiction. If the jurisdiction exists under the commonly accepted tests, then the local interest is not at all relevant. The desire for uniform application of maritime redress of wrongs overrides any local interest. The threshold question is whether admiralty

jurisdiction exists. Once determined that it exists, case law tells that otherwise purely local matters are of national concern because of its admiralty nature.

Even the Fourth Circuit's analysis that the nature is a purely local matter is highly questionable. The reasoning from a interstate commerce principle enunciated in McCready v. Virginia concluded that ovster cultivation is purely a local activity and therefore a tort preventing oyster commerce on the Warwick River was purely local. This concept of commerce has been repudiated repeatedly and most recently by This Court in Douglas v. Seacoast Products, 45 L.W. 4488 (1977) with Justice Marshall observing:

> "While appellant may be correct in arguing that at earlier times in our history, there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no

> question today that such power exists where there is some effect on interstate commerce. Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).[2]

The relevant question, the, becomes whether the grant of ownership of the fish resources in the territorial waters of the Commonwealth of Virginia, together with the power to control the appropriation of those fish resources, is broad enough to bring the tortious conduct alleged in the instant law suit within the ambit of Virginia's substantive law. We believe that both case precedent and a careful reading of the entire Submerged Lands Act compels a negative answer to this question.

The question of whether Virginia or federal maritime law should govern the tortious conduct in the instant case involves a determination of the breach of the regulatory and ownership power ceded to or possessed by the Commonwealth of Virginia and is thus a matter to be determined by the federal courts applying federal law. As stated by the Supreme Court in Borax, Ltd. v. Los Angeles, 296 U.S. 10, 22 (1935):

> The question as to the extent of a federal grant, that is, to the limit of the land conveyed, is necessarily a federal question; ...it involves the ascertainment of the essential basis of a right asserted under federal law.

THE COURT also makes it clear that the perimeters of the State's powers are not likely to be different depending upon whether the older case precedent or the Submerged Lands Act is deemed to apply, noting that:

> "The Submerged Lands Act of 1953 did

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[2] McCready v. Virginia, supra was specifically cited by Justice Marshall at Ft. Nt. 16 in Douglas.

> did not disturb these doctrines or their inherent limitations. The Act merely confirmed the State's pre-existing rights in the beds of navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto." Bonelli v. Cattle Co., 414 U.S. 313,318, (1973) (rev'd for other reasons) State Land Board v. Cornwallis Sand & Gravel Company, 45 L.W. 4105, 4107, ft. nt. 4;See also Oregon ex. rel.

Thus, it is not necessary to determine whether the 1953 Act in effect overruled the earlier case precedents. Both the earlier cases and more recent precedents examining the breadth and purposes of the Submerged Lands Act are persuasive authority.

The most recent in depth study of this problem, undertaken by the Court of Appeals for the Fifth Circuit in Zabel v. Tabb, 430 F.2d 199 (5th Cir., 1970), cert, den, 401 U.S. 910 (1971), amply illustrates that the boundaries of the State's powers must be limited by the purposes the grant

of ownership and regulatory control was intended to fulfill. In Zabel it was argued that the Submerged Lands Act prevented the federal government from enjoining a dredging operation harmful to the ecology of navigable waters overlying submerged lands. The challenging landholders argued that the Congressional relinquishment of title to the submerged lands together with the right and power to manage and use the land except for purposes relating to navigation, flood control and hydroelectric power, caused all other matters pertaining to these lands to repose in the States. In rejecting this contention Chief Judge Brown said:

> "...(T)his argument ignores both language found elsewhere and the legislative purpose of the Act. The controversy, often pressed with emotional overtones, was over oil and gas and whether the states were to reap the economic benefits of development royalties and to regulate the exploration

> and development or whether these benefits and these controls were to be exercised by the Federal Government as an adjuct of then newly declared 'paramount rights'...The Act and this relinquishment reflect the legislative compromise found in the combination of the Submerged Lands Act and Outer Continental Shelf Act. The adjacent states were to be the 'owner' of the resources and reap exclusively in the economic benefits of resources in the tidelands and have full control over management and exploitation. The Federal Government, on the other hand, was given exclusive ownership and control vis-a-vis the states in the Outer Continental Shelf." 430 F.2d at 205.

Thus, the states were interested in the ownership of the affected resources and in the power to regulate the appropriation of those resources, not in narrowing the admiralty's jurisdiction or in bringing aspects of maritime commerce within their control. In part because it looked to the purposes behind both the case precedent and the Submerged Lands Act, the Court in Zabel clearly thought the express reservations of federal power set forth

in 43 U.S.C. §1311(d) were not intended to be all inclusive, with all other powers reposing in the states, but were intended only to eliminate"...these frequent and extensive activities as a source of further state versus national controversy." 430 F.2d at p.205. The Court also noted that any doubt that these express reservations were not intended to be all inclusive was erased in a subsequent section of the Act, which provides:

> "The United States retains all its navigational servitude and rights in the powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311

> of this title." 43 U.S.C. §1314 (a). Emphasis added.

These expressly reserved powers seem clearly to go beyond the three powers reserved in Section 1311 (d) of the Submerged Lands Act, and the Court of Appeals for the Fifth Circuit so construed them, stating in a footnote:

> "But we have already shown that the enumeration of these three, (reserved powers) which are explicitly stated because they are particularly relevant to the regulation of land lying under navigable waters, does not imply that Congressional power over other typies of commerce was among the rights relinquished....
>
> "To hold otherwise would render the reservation of constitutional commerce power in §1314(a) a useless reiteration of the impliedly retained powers in §1311(d). But to hold that it is an explicit reservation of all commerce powers gives the section meaning. The section may be unneeded and overly cautious in that it reserves a constitutional power that has (not) been relinquished, but it should not be read in such a way as to render it otherwise useless." 430 F.2d at p. 206. Material in brackets added.

The conclusion reached by the Fifth Circuit in Zabel v. Tabb makes good sense and coincides with the earlier Supreme Court precedents that the States own and have the power to regulate the appropriation of marine resources in their territorial waters. What was of critical importance and most likely hotly contested at the time of those decision--as was true at the time of the enactment of the Submerged Lands Act--was not whether state or federal principles of substantive law should govern all aspects of the fishing or oil industry, but whether the fish and iol resources in and under the submerged lands and their overburden of navigable waters belonged to the adjacent States or to the Federal Government. And, the regulatory controls asserted by the States have in all instances dealt only with the appropriation of those assest--both the manner in which such resources could be appropriated and with the persons permitted to undertake such acts of appropriation, and have never been asserted to oust the admiralty of jurisdiction over torts occuring in those waters or over contracts governing such fishing enterprises. Thus, Smith v. Maryland, supra, dealt with the validity of a state statute prohibiting the capture of oysters by scoop or drag; McCready v. Virginia, supra, dealt with whether Virginia could prohibit citizens of other states from planting oysters in the Ware River; and Manchester v. Massachusetts, supra, dealt with the validity of a state statute prohibiting the use of nets while fishing in territorial waters. Not one of those decision, nor any others, indicate that the states can enact laws governing the rights of seamen injured in fishing ventures carried out in territorial

waters, or laws governing contracts entered into by the owners of those vessels with their crews and suppliers. It is thus both significant and revealing that, Smith, McCready, and Manchester notwithstanding, it has quite obviously always been assumed that maritime law applies to the vessels and their crews engaged in the business of appropriating these maritime resources which have been ceded to the states, and that the power of the states to regulate and control the appropriation of these assets does not remove from the jurisdiction of the admiralty matters that do not touch upon the ownership or manner of appropriating such resources and which otherwise qualify as maritime in nature. Thus, the early case precedents are entirely consistent with the conclusion of the Court of Appeals for the Fifth Circuit in Zabel v. Tabb, supra, that state ownership of the involved resources does not preclude the federal government from controlling activities in the affected area which do not affect the state's ownership rights and are of primary concern to a federal interest, such as maritime commerce and navigation.

Clearly, the Commonwealth of Virginia owns the submerged lands beneath which plaintiffs fished, and all natural resources contained therein. And, just as clearly, the Commonwealth has the undoubted power to regulate the manner in which the marine life contained in those waters can be harvested and to restrict the conveyances of leaseholds in those waters. That ownership and power does not, however, obviate the fact that these harvesting operations--once permitted by the Commonwealth--are undertaken through the use of documented ships peopled with seamen sailing upon navigable waters, and that the catches

once made are placed directly in interstate commerce. Once the Commonwealth of Virginia determines how the oysters are to be cultivated and harvested, and by whom, its concerns are fulfilled and the only interests yet remaining are the admiralty's interest in maritime commerce. And the admiralty has never left resolution of matters affecting these interests to state determination. The admiralty has always concluded that there is a need for national uniformity in resolving matters intimately intertwined with maritime commerce and navigation, as evidenced by the fact that it has consistently provided remedies for injuries caused by tortious conduct within its jurisdiction, and has not usually left redress for such injuries to the adjacent states. As stated by the Court in Adams v. The Montana Power Company, 528 F.2d 437 (9th Cir. 1975):

> "The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders." 528 F.2d at p. 439.

For a recent illustration of this policy's implementation, see Moragne v. States Marine Lines, 398 U.S. 375 (1970), establishing a remedy for wrongful death acts that had previsouly been used to fill the void. Redress of torts bearing a significant relationship to traditional maritime activity--such as fishing--has long been a matter of concern to the admiralty and can only be governed by state laws where the admiralty has not seen fit to promulgate uniform substantive laws or, occasionally, where the state provides a remedy in excess of those provided by the maritime law. As stated by Professors Gilmore and Black:

> "...(T)he states may not flatly contradict established maritime

> law, but may 'supplemen' it, to the extent of allowing recoveries in some cases where the maritime law denies them;...states may legislate freely on shipping matters that are of predominantly local concern, but that they may not so act as to interfere with the uniform working of the federal maritime legal system." Gilmore and Black, The Law of Admiralty (2d 3d., 1975) at p. 49-50.

The admiralty has developed a scheme of substantive laws governing torts interfering with or destructive of maritime commerce and navigation, and has not left these matters for local determination. And, those substantive laws have been applied to situations, such as the instant case, where the interference is caused by the destruction of fish essential to the successful carrying out of commercial fishing enterprises. See Union Oil Company v. Oppen, 501 F.2d 558 (9th Cir. 1974); State of California, By and Through its Department of Fish and Game v. S.S.

Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969), and the authorities cited therein. Thus, it can hardly be said that regulation of torts causing interference with maritime commercial activities is a matter of purely local concern which the admiralty has been content to leave to the states. The tortious conduct here, while its immediate effect was to destroy oysters, had a direct and readily foreseeable impact upon the operations of the vessels and their crews engaged in harvesting those oysters, and thus directly interfered with an aspect of maritime commerce long deemed within the jurisdiction of the admiralty. And, the admiralty has long provided remedies for tortious interference with maritime commerce and navigation. See Carroll v. Protection Maritime Insurance Co., Ltd., 512 F.2d 4 (1st Cir. 1975). There, in holding that the blacklisting of seamen constituted a maritime

tort within the jurisdiction of the admiralty, the Court said:

> "The tort alleged in this case seems to be so interwoven with present and potential maritime contractual relationships--traditional concerns of the admiralty--as to fall within that jurisdiction. Moreover, as we have noted, the impact of such a tort as this, while felt by the blacklisted seamen, is equally manifest in the operation of the affected vessels." 512 F.2d at 8-9. Emphasis added.

So too, here, the tort of polluting the oyster beds is interwoven with maritime commerce and navigation and has its impact upon the ability of plaintiffs to successfully perform those purely maritime functions. Neither case precedent nor the Submerged Lands Act give any indication that those purely maritime functions are to be included in the powers and assets ceded to the states notwithstanding, matters of traditional concern to the admiralty, and must be governed by uniform admiralty principles. It cannot be presumed that the Courts or the Congress, in recognizing the right of the states to own and regulate the appropriation of the assets in their territorial waters, intended to carve out of the admiralty's traditional jurisdiction matters bearing a significant relationship to maritime commerce and navigation simply because they occurred in those territorial waters. Surely, had so broad an intrusion upon the admiralty's jurisdiction been intended it would have surfaced long before this case. Yet, no precedent compels, nor would sanction, this conclusion--a conclusion that would put jeopardy in large volumes of admiralty precedent involving matters occurring in these territorial waters.

The torts committed by defendants in this case do bear a significant relationship to maritime commerce, and are thus

maritime in nature. Moreover, they involve interference with a traditional and widespread facet of maritime commerce--fishing in territorial waters--and it is important that all such tortious activity, regardless of where it occurs, be governed by the same legal principles and not left to a conflicting array of disparate state laws. These matters must, therefore, be governed by uniform principles of maritime law.

III

THAT THE CONTAMINATION OF THE WARWICK RIVER CONSTITUTED AN UNCONSTITUTIONAL TAKING WITHIN THE PURVIEW OF FEDERAL AND STATE CONSTITUTIONAL STANDARDS.

A. The deprivation of the use of the oyster beds is tantamount to a taking.

It is generally held that a taking occurs whenever the government acts in such a way as to substantially deprive an owner of the useful and beneficial interest in that which he owns. The Court below, held that the negligent activities of the city in repeatedly dumping sewage into the Warwick River causing the closure of the osyter beds were at best nothing more than a negligent impairment, not subject to due compensation. With this the petitioners disagree. The overflows totally deprived the oystermen of the only reasonable use of their property and can only be viewed as an unconstitutional taking without just compensation.

Property is taken when inroads are made upon an owners use of it to the extent that a servitude has been acquired by agreement or in the course of time. U.S. v. Dickinson. 331 U.S. 745 (1947). Intermittent flooding can result in such a servitude as can repeated trespass by government directed projectiles

Portsmouth Harbor v. U.S. 260 U.S. 327(1922). Government inroads on private property minor enough not to amount to a servitude are labeled mere torts and therefore damages are consequential and not compensable. The distinction drawn is between mere tortious invasion of one's property rights and an appropriation of sufficient magnitude to amount to a taking. Harris v. U.S., 467 F.2d 801 (8th 1972). It is not a mere tortious invasion when the injury rises to the magnitude of an appropriation of some interest in that property to the government. National By-Product v. U.S., 405 F.2d 1256 (C.Cl.1969). The Fourth Circuit in Ballard v. Glaser, 424 F.2d 473 (4th Cir.1970) recognized this same distinction between a tort and a taking. Judge Butzner, speaking for the Bench, stated that government action results in a taking of property rather than a simple tort if the effects are so complete as to deprive the owner of all or most of his interest in this property. The oystermen have been permanently deprived of the sole reasonable use of their oyster bed as a direct result of the repeated failure of the City sewage disposal system. Rather than being a negligent impairment or a tortious invasion, the City of Newport News has imposed an involuntary servitude upon the oystermen. The repeated actions of the city ousted them from the use and enjoyment of their property and amounted to a taking. See U.S. v. Causby, 328 U.S. 256 (1947).

The pollution of a stream making it unfit for use is a taking for which compensation must be paid. Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F200 (7th Cir. 1915); Crane v. Brintnall, 278 NE2d 703. Interference, which destroys or substantially impairs property use or

value, is a taking for due process purposes. The City's discharge of pollutants into the Warwick has caused the continual condemnation of the oyster beds obliging the City to compensate the lessees of the beds.

The contamination of the River by the City is the reason for the oyster beds continual condemnation pursuant to preexisting FDA and health code standards. The health standards were in effect long before the City's pollution occurred; the standards are based on reality not fiction; the contamination is real and comports with scientific data. The oyster bed lessees are entitled to compensation for their losses regardless of whether the losses are caused by preexisting regulations and laws, or by actual harm. P. Nichols, Eminent Domain, §6.37 p. 1102. The health regulations preexisted the contamination by the City; and City contamination made the beds subject to closure pursuant to health regulation standards. It is the proper non-compensable use of police power to destroy dangerously diseased trees. Miller v. Shoene, 276 U.S. 272 (1928). The Miller reasoning doesn't apply however if the infection itself is caused by unreasonable governmental conduct, as is the case here. The oystermen here are not alleging that the FDA or health standards are unreasonable or improperly applied to them; they have proven to the satisfaction of a jury that the City improperly caused the regulations to be applied. The City's conduct in this regard constitutes a compensable "taking" pursuant to due process standards.

B. That a taking of property can be negligently as well as deliberately caused.

Assuming that the City's contamination

of the River was the result of negligent rather than deliberate acts does not mean that the contamination was not a taking within the ambit of the Fifth Amendment. Federal Courts recognize that despite a lack of intent to acquire any property, certain governmental actions ential substantial invasion of private property interest for which a taking will be implied. See, e.g. Goldblatt v. Hempstead,369 U.S. 590(1962), U.S. v. Kansas City Life, 339 U.S. 799 809-810. (1950), Portsmouth Harbor Land and Hotel v. U.S., 260 U.S. 327 (1922). Destructive activities within the scope of governmental authority can provide the basis for a taking even where they are carried on in a manner which can be characterized as imprudent, wrongful, or mistaken, Eyherbide v. U.S., 345 F.2d 565,570 (C.Cl.1965) C.F. Larson v. Domestic S. Foreign Commerce Co., 337 U.S.

682,689,692,693-695,703 (1949); Forest of Dean Iron Ore Co. v. U.S., 65 F. Supp 585 (1946); Siberman v. U.S., 71 F. Supp 895 (D. Mass 1941). The Fourth Circuit recognized that government activities negligently engaged in depriving an owner of his property interest can support an implied taking. Ballard Fish & Oyster v. Glaser Const. Co. 424 F.2d 473 (4th Cir. 1970). In Ballard the Court ruled that negligence in the destruction of oyster beds by government action in connection with the laying of pipeline could warrant just compensation. The City of Newport News negligent acts were directly connected to the authorized construction and maintenance of the sewage disposal systems and therefore are a taking.

Where a direct physical invasion is a foreseeable result of a government action, loss caused in not consequential and a

taking is implied. Eyherbide v. U.S., 345 F.2d 565, 570 (Ct. Cl, 1965). CF U.S. v. Dickinson, 331 U.S. 745, 751 (lack of prudent care was part of basis for compensation) CF B. Amusement Co. v. U.S., 180 F. Supp 386 (1960 Ct. Cl).

Sanguinetti v. U.S., 264 U.S. 146 (1924) is not inconsistent with the view that the negligent acts of Newport News amounted to a taking. Sanguinetti involved flooding damage which was allegedly caused by government construction of a dam. The Court would imply no taking in the absence of a showing that the flooding was a direct and necessary result of the structure, or that it was within the contemplation of, or reasonably to be anticipated by the government so as to amount to an appropriation of and not merely an injury to the property. In Sanguinetti the engineers building the structure utilized reasonable care in the planning stages and were in no way guilty of negligence. The jury in the instant case determined that Newport News could reasonably anticipate that their actions might result in injury to the oystermen and found that the city was negligent in the maintenance and construction of the sewage system. The overflow of sewage deprived the oystermen of the only reasonable use of their property amounting to an appropriation and not to a mere injury. See U.S. v. General Motors Corp., 323 U.S. 373 (1949).

The provision against takings in the Virginia Constitution is more liberal than the federal constitution. The Virginia Constitution has expanded the necessity of compensation to include the damaging of private property for public use, §58 VA Constitution. This addition to the wording of a "taking" provision imposes a liability for consequential injuries.

See P. Nichols Eminent Domain. The Supreme Court in Virginia has held that irrespective of the issue of negligence, private property is taken or damaged for public use by a state agency clothed with the power of eminent domain, the owner is entitled to compensation. Heldt v. Elizabeth Tunnel District. 196 VA 477, 84 S.E.2d511 (1954); 203 VA 196, 123 S.E.2d 398 (1962). So even if the injuries to the oystermen are viewed only as consequential or indirect, compensation is still demanded under the Virginia Constitution.

To be distinguished from Heldt is Erickson v. Anderson, 79 S.E.2d 597, which held that Virginia will not be liable under the taking provision of Virginia Constitution for negligent acts of its officers and servants committed in connection with construction of public improvements. Read broadly, the case seems to hold that all negligent acts of public officials or agents cannot be regarded as actions of the State for which a taking can be implied. The case, however, must be limited to its facts if it is to be consistent with other Virgina eminent domain cases.

In Erickson the damages were caused by the "careless, reckless and wanton acts of the State Highway Commission through its servants, agents and employees." Supra at 599.

The Court reasoned that there was nothing whcih authorized the officers or agents of the state to commit wrongful acts and therfore tortious conduct could not be regarded as acts of the government which could imply a taking. Tortious acts by the instrumentalities of the state, however, have, in the past, been construed as sufficient to support a taking under the Virginia Constitution.

When first construing the damaging aspect of the takings provision, the Virginia Supreme Court stated in Nelson County v. Loving, 126 VA 283, 161 S.E. 406 (1919), that the states failure to give consent to being sued on an action based on Tort would prevent claims of damage for personal injuries, but not for property damage. The Court cited with approval a California decision whic permitted compensation for injuries caused by the neglect of officers and agents of the State, Tyler v. Tehama City, 109 Ct. Cl.618, 42 Pac. 240, Nelson at 410. Heldt decided later in the same year as the Erikson case found no difficulty with permitting compensation where there were acts of ordinary negligence perpetrated by an agent of the state damaging private property. The difference in Erickson is that the acts of the agents and the employees were so wanton and reckless that one could not say that they were the acts of the State. In contrast, it is proper to imply a taking for ordinary acts of negligence in the construction or everyday operation of a public project. C.F. Granone v. City of Los Angeles, 42 Cal. 34, 47.

C. Hampton Roads Sanitation District is Liable for all damage done as a result of condemning oyster land underneath a sewage outflow line.

The deprivation of the use of the oystermen's leasehold by causing them to be subject to police power regulations which closed the oyster beds to harvesting is an unconstitutional taking. The government is liable for all direct damages which occur as a result of eminent domain proceeding. Property which is not taken in a condemnation proceeding must be paid for if it is destroyed as a direct result of the

condemnation. The Sanitary District was fully aware of the state and FDA's precautionary procedures in prohibiting the oystering of lands adjacent to sewage outfall lines.

The Sanitary District was, however, in need of the land immediately under the outfall line and used their power of eminent domain to condemn it and compensate the owners. Rather than using their power of eminent domain to condemn the entire area deprived to the oystermen, the District only condemned the land physically underneath the outfall line. It was a direct and necessary result of this governmental project that the police power of the state had to be implemented prohibiting the sole reasonable use the oystermen had for their property.

The state's reasonable use of the police power in prohibiting the oystering in the area referred to as the buffer zone is not challenged by the oystermen. It is instead the actions of the District which effectuated the deprivation of the oystermen's interest which is challenged.

The District Court Judge in this case noted that damage caused by the use of **state** police power when regulating the use of property does not constitute a taking. This is undisputed, and if no other governmental entity were involved, except the State Health Department, there would be no taking. But this is not the mere use of the police power which has substantially impaired the property rights. It is the action of Hampton Roads in building an outfall line on the property which caused the imposition of the regulations. As pointed out in Nichols' treatise on Eminent Domain subjection to police regulation as a result of taking demands compensation:

> "If, as a result of a taking, it

> is made a subject to laws which it was not subject before, and such laws affect its value, the owner is entitled to be compensated for the decrease thus brought about, because it is a direct result of the taking of his land by eminent domain, regardless of whether the laws which will impair its use are natural laws or police regulations." 6.37 p.1102.

Indeed, it is widely recognized that where only part of a tract is taken in the exercise of the power of eminent domain, the owner is entitled to recover damages, not only for the part taken, but also for injuries to the residue. 29A C.J.S. 139; U.S. v. Vepco,365 U.S. 624. The Virginia Supreme Court makes it clear that "...In ascertaining such damages, every circumstance, present or future, which affects its then value may be considered." Part of the oyster bed was taken, directly causing the imposition of police power regulations which destroyed the value of the remainder not taken. Colonial Pipeline v. Lohman 207 VA 775, 152 S.E. 2d 34 (1967).

Even if the injury to the oyster beds was viewed as indirect and consequential, the State Constitution of Virginia demands compensation. Consequential damages are recoverable under Section 58 of the Constitution of Virginia where the injury was the proximate result of action of the State. Heldt v. Elizabeth Tunnel District, 196 VA 477, 84 S.E. 2d 511,514-15. The buffer zone's creation, preventing oystering, was directly caused by the installation of the outfall line. Compensation is mandatted by both the federal and state constitutional provisions.

CONCLUSION

This case involves tortious interference with an activity of traditioanl concern to the admiralty. Moreover, the tortious conduct had its impact upon navigable waters of the United States. Thus, by any

test or standard, the tort is maritime in nature and within the admiralty and maritime jurisdiction of the federal courts. That the resources in these navigable waters have been ceded to the adjacent states does not alter the fact that the activity interfered with is maritime, and thus of primary concern to the federal courts and subject to its uniform admiralty law. For these reasons, the opinion of this Court should be affirmed.

In this case the Fourth Circuit has made a drastic departure in admiralty jurisdiction analysis. That the resources in the navigable waters where the maritime tort occurred have been ceded to the adjacent states does not alter the fact that the activity interfered with is maritime and thus of primary concern to the federal courts and subject to its uniform admiralty law. The circuit has decided the takings issues contrary to other federal court and State Supreme Court reasoning. Wherefore Petitioner prays that the decision of the Court of Appeals for the Fourth Circuit be reversed and remand to the District Court for trial on the merits.

Respectfully submitted,

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I hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of The United States that I mailed a true and correct copy of the foregoing to all Counsel of Record by depositing the same in a United States Mailbox, with First Class Postage Prepaid, addressed to Counsel of Record at his Post Office Address this 11 TH day of October, 1977.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-540

WILLIAM A. MOORE, ET AL.,

....PETITIONER

V.

HAMPTON ROADS SANITATION DISTRICT COMMISSION

AND

CITY OF NEWPORT NEWS,

....DEFENDANTS

APPENDIX FOR THE PETITIONER

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

WILLIAM A. MOORE, ET AL.,

Plaintiffs.

v.

HAMPTON ROADS SANITATION DISTRICT
COMMISSION
and

CITY OF NEWPORT NEWS,

Defendants

CIVIL ACTION NO. 100-72-NN

OPINION AND ORDER

March 10, 1975

This action began with the filing of a complaint on September 15, 1972, by William A. Moore, Carrie Carter, Gayle Hogge, Piankatank Oyster Co., Inc., Mahlon E. Hahn, William S. Forrest, Marvin E. Horton, W. D. Melzer, Byrn Cliff Seafood Corp., Inc., Joseph Melzer, Mervin Lozaw, plaintiffs, against Hampton Roads Sanitation District Commission (Hampton Roads), and the City of Newport News (Newport News), defendants. Thereafter Carrie Carter and Joseph Melzer were dismissed as plaintiffs, and Evelyn Hines, Cranston Morgan and Nelson Firth, Sr., were added as intervenor plaintiffs.

Jurisdiction is alleged under Title 28 U.S.C. §1331 as involving questions under the Constitution and Laws of the United States and on Title 28 U.S.C. §1333 upon the theory of maritime tort.

The Complaint charges that the plaintiffs are lessees of various oyster grounds located in the Warwick River in the City of Newport News. The defendant, Hampton Roads, operates a sewerage treatment plant adjacent to the Warwick River with an outfall line into that River. The defendant, Newport News, operates the lines, laterals, and pumping stations in the area sewerage collection system.

It is claimed that the defendants have caused untreated and partially treated sewerage to be discharged into the Warwick River and its estuaries, which has resulted in the pollution of the River. As a result of high coliform counts the Warwick River in which the plaintiffs have oyster grounds was closed by the Virginia Health Department for the purpose of harvesting and marketing oysters on March 29, 1972. The plaintiffs contend that the value of their oyster leases and the

oysters thereon have been destroyed and seek damages of both defendants on two theories: (1) negligence; and (2) the taking of property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The matter has been vigorously contested by the defendants at every stage of the proceedings. They initially responded to the complaint with motions to dismiss on grounds that the complaint failed to allege a cause of action.

After hearings upon those motions, this Court issued an extensive Opinion and Order on March 20, 1973, to which reference is made and which is incorporated herein. In that Opinion, we found that Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307, aff'd, 249 U.S. 540(1919), holding that the right of the City to empty raw sewerage into Hampton Roads was a public right, had lost vitality in the face of later clear and explicit state legislative action to the contrary. The year-by-year march of the General Assembly of Virginia away from the Darling position was documented.

In that Order we specifically said:

> "We make no comment at this point as to the depth of any claim of plaintiffs for civil damage or injunctive relief. It would appear that both Hampton Roads Sanitation District Commission and the City of Newport News are immune from liability for negligent tortious conduct. (Footnote omitted). We note further that Section 62.1-44.15 (14) of the Virginia Code expressly provides that otherwise unlawful dumping of untreated or improperly treated sewerage 'may be justified' under certain circumstances."

We therefore, reserved comment on liability pending production of further evidence in either appropriate discovery proceedings or at trial.

About a year later further oral arguments were heard on additional motions of the defendants to dismiss on the theory of

the immunity of these defendant state agencies acting in their governmental capacities from suits in tort. In a second Opinion and Order, entered January 29, 1974, and incorporated herein, we found that Hampton Roads was, according to the language of the charter, a creature of the Legislature which was to perform a governmental function in the construction and operation of a sewerage disposal system and with Newport News, a municipal corporation and political subdivision, would enjoy immunity from negligence suits while acting in a governmental capacity. We again expressed our concern as to whether these state agencies could be held responsible for a taking within the ambit of the Fifth or Fourteenth Amendments. We acknowledged, however, that these defendants, in spite of charter language, might be liable for tortious injury if it was concluded that their operation of a sewerage disposal system was a proprietary function. We directed that the suit should continue to give the plaintiffs the opportunity to introduce evidence at a trial, either that they had been unconstitutionally deprived by the defendants of property rights without due process or just compensation, or, that the defendants were negligent and that such negligence occurred when the defendants were engaged in a proprietary function.

On June 3, 4, 5 and 6, 1974, this litigation came on for trial before a jury at Newport News. At the conclusion of the plaintiff's evidence, Hampton Roads moved for a directed verdict. We sustained that motion and stated in the record that we would later record our reasoning, which we now do.

It was apparent at the conclusion of plaintiff's evidence that no evidence had been developed in any way to show that

Hampton Roads was guilty of any negligence whatsoever. There was no evidence that the James River Plant of Hampton Roads had overflowed or had functioned improperly or that untreated affluent pollutants had been deposited in the Warwick River through any action of Hampton Roads. The plaintiffs agreed to this and acknowledged on the record that their only claim against Hampton Roads was under the Fifth and Fourteenth Amendments. They argued that a buffer zone against the harvesting of oysters which had been established around the area of the James River Disposal Plant outfall by the State Department of Health was a taking by Hampton Roads without compensation under the Fifth and Fourteenth Amendments. No evidence was produced that Hampton Roads had anything to do with the creation of that buffer zone. It was established by the State Health Department under health standards and authority extant since the 1930's. Hampton Roads had exercised its power of eminent domain to condemn and pay for that part of the bottom that it was physically using for its outfall line.

The action of the State Board of Health in Shellfish Restrictive Order No. 55, establishing the buffer zone at the outfall of Hampton Roads' James River sewerage disposal plant, was pursuant to Section 28.1-175, Code of Virginia, 1950, Amended.

Similar action closing the identical area of the Warwick River had been directed by the State Board of Health under authority of the same statute on many occasions prior to the opening of the James River plant in 1967. The entire River had been closed in 1942 and again in 1962.

No attack on the constitutionality of Title 28.1 of the Virginia Code affecting shellfish, nor to the health standards

thereunder, was raised by the plaintiffs in this suit. There was no evidence that any plaintiff had availed himself of the express provisions of Title 28.1-178, Code of Virginia, 1950, Amended, to have the restriction released.

The provisions of Title 28.1-175 of the Code of Virginia protecting the health of the public are an undoubted proper exercise of the police power of the State. In Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E. 2d 153, 160 (1955), the Virginia Supreme Court quoting, with approval, 25 Am.Jur., Health, §24, said "A Statute empowering a State board of health to prohibit the use of water or ice from any given source where, in the opinion of the board, the use thereof endangers the public health is valid, and does not offend against the constitutional provision respective personal liability."

The exercise by the State of that proper police power was not an illegal "taking" of property under the Fifth and Fourteenth Amendments, certainly not by Hampton Roads, who did not seek or declare the buffer zone. We so held in directing a verdict in favor of Hampton Roads, we now so hold as to the City of Newport News.

In Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987 (1962), Mr. Justice Clark for a unanimous court, declared the principles of Mugler v. Kansas, 123 U.S. 623, to be good law, i.e.:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injuries to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." 123 U.S. 668, 669, quoted at 369 U.S. at 593.

The only real issue remaining at the trial in June, 1974, after Hampton Roads had been dismissed as a party defendant, was whether Newport News had been guilty of negligence, and if so, whether it was legally answerable for that negligence.

We declined the invitation of the City of Newport News to release it on a directed verdict because we believed that the plaintiffs, having demanded a jury, had a right to have that jury determine whether the City had been guilty of any negligence, a factual question. The Court, though overruling the City's motions, expressed grave misgivings that the City would be liable in any event.

The evidence at trial showed that certain pumping stations in the sewerage collection lines operated by Newport News, designated as Stoneybrook #1, Stoneybrook #2, and Eastwood or Lucas Creek, persistently overflowed raw sewerage over a protracted length of time in the period 1970-1972. These stations are located on a brach of the Warwick River where the River is little more than a ditch, four-five feet wide. The pumping stations are four to five miles from the oyster leases here under closure. Expert testimony was available to the jury from which the jury could find that these sewerage overflows would form the basis for the high coliform count which dictated the closure of the Warwick River to oystering.

Answering by way of a special verdict form the jury foudn that the poor water quality (high coliform count) in the Warwick River was caused by the overflows of the sewer system of Newport News; that the City was guilty of negligence in the operation of its sewer system; that the negligent operation of the City sewerage system was the proximate cause of the conditions requiring the closing of the River to harvesting shellfish.

Upon the return of the jury verdict,

the City of Newport News promptly moved for a judgment non obstante veredicto. The motion is now before us and is based on many grounds. Since we conclude that the plaintiffs are not entitled to recover from Newport News for two principal reasons, we will not review all of the objections which Newport News raised to the verdict.

We have already indicated elsewhere in this Opinion our judgment that Newport News could not be held liable upon the theory of an unlawful "taking" of oyster grounds in the Warwick River by the State Department of Health anent the high coliform count in the River. We enlarge on that to this extent. The action of Newport News was to build a system of collecting pipes and pumping stations to fulfill its obligations to its citizens to collect sewerage. The performance of this City function, that is, in the construction of the system, is not the basis for the pollution problem in the Warwick River upon which the State Department of Health issued Closure Order No. 91 in March, 1972. The system had been in operation long before that date. It is the negligent failure of three pumping stations within that system on a temporary basis which may have accounted for the pollution. We have nothing more than a negligent impairment which is, at best, a tort. *Columbia Basin Orchard v. United States*, 132 F.Supp. 707 (Ct. Cl. 1955); *Sanguinetti v. United States*, 264 U.S. 146, 44 S.Ct. 264 (1924); *Eriksen v. Anderson*, 195 Va. 655, 79 S.E. 2d 597 (1954). Such an intermittent overflow as herein occurred in three pumping stations, subject to remedy, is negligence, not the exercise of eminent domain.

NEGLIGENCE ISSUE

We conclude that the City of Newport News in the operation of its sewerage collection system, was engaged in a governmental function and as such, is immune from negligence.

A municipality in Virginia is immune from liability for negligence in the performance of its governmental functions. *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E. 2d 808 (1962); *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939):

> "The 'governmental-proprietary'distinction in municipal immunity is theoretically based on the nature of municipal corporations. The municipal corporation is both a corporate and governmental unit. As a corporation it is liable to the same extent as any private individual, but as a governmental unit, it is an agent of the state and hence a sovereign body. The governmental-proprietary destruction is, therefore, a translation of these two identities into tort liability." See 18 McQuillin, Municipal Corporations, Section 53.01a (3d Rev.Ed. 1963)."

In Virginia, the duty of the preservation of the public health is one we find to devolve upon the City as a sovereign power and is a "governmental" function.

In a case involved with the removal and collection of garbage, which certainly approximates the sewerage disposal obligation of a City, the Supreme Court of Virginia, said in Ashbury v. City of Norfolk, 152 Va. 178, 147 S.E. 223 (1929):

> "With respect to matters concerning the public health, * * *there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolves upon the State as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the State, the State is acting strictly in the discharge of one of the functions of government. If the State delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation, likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation but of the citizens of the Commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such power is entitled to the same immunity against suit as the State itself enjoys; * * * it can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health." Ibid at 285, 286, quoting from Love v. Atlanta, 95 Ga. 129 (1894).

This view is supportive of the declaration of the Supreme Court of the United States in City of Trenton v. State of New Jersey, 262 U.S. 182 (1923):

> "It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and

> courthouse, the protection of the city's inhabitants against disease and unsanitary conditions....." 262 U.S. at 191. (Emphasis added).

And in *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E. 2d 209 (1973), the garbage collection function was held to be governmental.

The function of the disposal of sewerage is accomplished, not for the special benefit of the municipality, but is for the common good of all, being intimately connected with the public health.

In the Act validating the creation of the Hampton Roads Sanitation District, Chapter 66, Acts of Assembly 1960, the legislature specifically provided in Section 31 that "(t)he exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the Commonwealth and for the promotion of their safety, health, welfare, convenience and prosperity and as the operation and

maintenance of the sewage system by the Commission, will constitute performance of essential governmental functions." (Emphasis added).

Section 32 of that Act, in part, provides:

> "...the sewage system of the District shall be exempt from any and all liability which may be incurred by or imposed upon the Commission or any county, city or town or political subdivision." (Emphasis added).

It would seem logical to conclude that if the sewage system of Hampton Roads was officially declared to be a governmental function then the connecting lines and laterals of the City of Newport News were, in the eyes of the legislature, to be afforded the same treatment not only by the specific language of Chapter 32 above, but by analogy to Chapter 31, and the statement of governmental function as therein contained. The nature of the function being performed does not change as the affluent leaves the lines of Newport

News and enters the system of Hampton Roads.

Sewer facilities and their construction and operation were held to be a governmental function in Register v. H. Burton Elliott, Inc., 229 A.2d (Dela. 1967). Sewer systems in the State of Texas are a governmental function of municipalities, see City of Texarkana v. Taylor, 490 S.W. 2d 191 (Tex. 1972); Fidelity Land & Trust Co. of Texas v. City of West University Place, 496 S.W. 2d 116 (Tex. 1973). So also in Florida a sewerage disposal system is a governmental function, Buchanan v. City of Miami, et al., 49 S.2d 336 (Fla. 1950); AIA Mobile Home Park, Inc. v. Brevard County, 246 S.2d 126 (Fla. 1971). So also in Georgia, City Council of Augusta v. Cleveland, 148 Ga. 734, 98 S.E. 345 (1919); City of Douglas v. Cartrett, 109 Ga. App. 683 (1964), 137 S.E. 2d 358.

We do not regard the decision in Chalkley v. City of Richmond, 88 Va. 402, 14 S.E. 339 (1891), to be definitive on the governmental immunity problem here presented. In that case the City had attempted to correct a defect in an underground culvert of substantial size. In so doing, the former smooth curves in its course had been replaced by apparent right angle turns and as a result, the flood waters invaded a cellar. The condition had existed for 12 years with constant repercussions. The liability of the City was based on its creation of a nuisance. (Page 341).

Nor do we find City of Richmond v. Wood, 109 Va. 75, 63 S.E. 449 (1909), to be controlling. The case was decided upon pleadings and evidence problems, with very little information available on the nature of the difficulty, except that like Chalkley, it would appear that the City had created a nuisance in the construction of a storm drain that was too small. Nuisance was the binding ingredient in each case.

In the instant case, the sewer system was not a nuisance in a legal sense. On a temporary basis, three pumping stations did overflow. It occurred in an area which was rapidly expanding populationwise. There were isolated occasions when conditions arose to apparently overload the facility. The City made diligent efforts to overcome the difficulty by enlarging pump capacity and modifying the system. The occasional discharge was not on to the private property of residents at the pumping sites, but into the reaches of the Warwick River. The raised fecal coliform count on the oyster leases was 5 miles distant.

The City was not maintaining a nuisance. At the most it could only be answerable

to a charge of negligence in the temporary failure of pumps in a sewerage collection system, a sewerage collection obligation thrust upon it by the State. These were not the conditions at the time of Chalkley, supra, or Wood, supra. As the duty now exists the municipality has no alternative to discharge the affluent into the River, as in Darling, supra, but must only convey to a sanitation disposal system operated by another state agency.

REQUIREMENTS OF NOTICE OF CLAIM

For purposes of appeal, we likewise find that the plaintiffs failed to give the sixty day statutory notice of their claim against the City of Newport News.

Section 8-653, Code of Virginia of 1950, Amended, as applicable in 1972, read as follows:

> "§ 8-653. Notice to be given cities and towns of claims for damages for

> negligence.--No action shall be maintained against any City or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within sixty days after such cause of action shall have accrued, except that when the claimant is an infant or non compos mentis, or the injured parties dies within suxh sixty days, such statement may be filed within one hundred and twenty days; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provisions of any city or town.
>
> "This section as amended shall take precedence over the provisions of all charters and amendments thereto of municipal corporations in conflict herewith heretofore granted. It is further declared that as to any such future charter or amendment thereto that any provision therein in conflict with this section as amended shall be deemed to be invalid as being in conflict with §52 of the Constitution unless such conflict be stated in the title to such proposed charter or amendment thereto by the words 'conflicting with § 8-653 of the code' or substantially similar language. (1938, p. 360; Michie Code 1942, § 6043a; 1954, C.427)."

Closure of the Warwick River was ordered March 29, 1972. Suit was filed in September, 1972. No notice was given to the City of Newport News by the plaintiffs in this action. No notice was averred in the complaint. No notice was proved to have been given. The City of Newport News raised the notice issue in its first motion to dismiss. The notice is mandatory. The City of South Norfolk v. Dail, 187 Va. 495, 47 S.E. 2d 405 (1948); Daniel v. City of Richmond, 199 Va. 490, 100 S.E. 2d 763 (1957). The argument is made that Newport News had notice because residents of the area of the sewerage overflow reported such overflow to the City. These reports were not from the claimants in this case. The further argument that notice is not required in an admiralty case (The West Point, 71 F. Supp. 206 (E.D. Va. 1947) is not applicable here. This negligence action relied upon acts of Newport News several miles removed from the navigable waters. A maritime aspect was only in the claim that oysters in navigable waters became a damage item.

There is no "combination of maritime wrong and maritime location", nor is it a wrong involving shipping or commerce, as these two tests are suggested in McGuire v. City of New York, 192 F.Supp. 866 (S.D.N.Y. 1961). In this circuit in Hastings v. Mann, 226 F.Supp. 962 (E.D.N.C. 1964), aff'd 340 F.2d 910 (4th Cir. 1965), the court held that the tort, to be maritime and in admiralty, ought to be based on some element of maritime wrong and maritime situs.

At trial, from the bench, we orally found that no evidence of negligence had

been produced by plaintiffs against Hampton Roads Sanitation District Commission, nor did liability arise to Hampton Roads Sanitation District Commission, on the theory of a "taking" within Constitution prohibitions. For the reasons now further stated herein, we affirm that position and DISMISS this action as to Hampton Roads Sanitation District Commission.

We also find, for the reasons stated herein, that no liability attaches to the City of Newport News under the theory of a "taking" in contradiction to the Fifth and Fourteenth Amendments to the United States Constitution.

And we now further find that despite a jury verdict that the City of Newport News was negligent in the operation of its sewerage collection system that it is nonetheless immune from civil prosecution for negligence by these plaintiffs in its operation of that system, as the same is a governmental function.

The motion for a verdict in favor of the defendant, City of Newport News, notwithstanding the jury determination that the City of Newport News was negligent, is hereby GRANTED, and this action is DISMISSED as to the City of Newport News.

It is so ORDERED.

4TH CIRCUIT COURT OF APPEALS

On Appeal From Eastern District
of Virginia, Newport News Division

No. 75-1576
75-1577
75-1578

WILLIAM A. MOORE, ET AL.,

Appellants-Cross-Appellees

v.

HAMPTON ROADS SANITATION DISTRICT
COMMISSION
and

CITY OF NEWPORT NEWS,

Appellees-Cross-Appellants

OPINION AND ORDER

July 13, 1977

4TH CIRCUIT COURT OF APPEALS

On Appeal From Eastern District
Of Virginia, Newport News Division

Before CRAVEN, Circuit Judge, FIELD, Senior Circuit Judge, and THOMSEN, Senator District Judge.*

THOMSEN, Senior District Judge.

Claiming jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 133 (admiralty and maritime jurisdiction). plaintiffs' complaint alleged that the value of oyster beds in the Warwick River leased to them by the Commonwealth of Virginia has been destroyed as a result of improper operation of a sewage disposal system by defendnats, City of Newport News (City) and Hampton Roads Sanitation District Commission (Commission). From a judgment entered in favor of defendants after

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*Sitting by designation.

trial, plaintiffs have appealed.[1] Plaintiffs base their claims against the City on alleged negligence, nuisance and taking of their property without just compensation; they base their claims against the Commission only on an alleged taking.

Leases of underwater beds for cultivation and harvesting of oysters are granted by the Commonwealth for a term of 20 years at an annual rental of $1.50 per acre or fraction thereof, renewable by the lessee after each term, and are treated as chattels real under Virginia law. Va. Ann. Code, 1973 Repl. Vol., §28.1-109(12).

The Warwick is a small river which empties into the James a short distance northwest of Hampton Roads. The few miles with which we are concerned, in which the oyster beds leased to plaintiffs are located, lie between the lower part of Fort Eustis and the City of Newport News and are navigable and tidal. The State Health Commissioner has closed and reopened the Warwick River or portions thereof to direct marketing of oysters a number of times since 1941.

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[1] The City and the Commission have cross-appealed from an interlocutory order denying their motions to dismiss the action, in order to preserve their contention that they had an unqualified right to discharge sewage into the Warwick River.

The City has for many years operated pumping stations which pump sewage to sewage plants operated by the Commission. On several occasions these pumping stations have overflowed into the Warwick River. In 1962 the State Health Commissioner prohibited the harvesting of oysters in the entire river for a short period; that closure is not the basis of any claim in this case. By 1966 portions of the river had been released from that prohibition; however, in 1966 one or more pumping stations overflowed and the State Health Commissioner again closed, due to the

high coliform counts, the northern portion of the river in which the beds of several plaintiffs were located. In 1972 there were additional pumping station overflows and the central portion of the river, in which the beds of some of the plaintiffs are located, was closed. The statute under which the closures were made permits transplanting of oysters from closed areas into approved areas if a special permit is obtained. Va. Ann. Cod, 1973 Repl. Vol., §28.1-179. Some of the plaintiffs took advantage of this provision, but the evidence indicates that the results were not satisfactory.

During all material times the Sanitation Commission has operated sewage treatment plants in the area. Since 1967 the Commission has operated the James River Sewage Treatment Plant, which discharges treated sewage into the water at the mouth of the Warwick. In that year the conclusion of all the evidence, the judge submitted to the jury three "inquiries" which the jury answered to the effect that: (1) the high coliform count in the Warwick River which was the reason for the 1966 and 1972 closures was proximately caused by the maintenance and operation of the sewer system of the City; (2) the City was guilty of negligence in the operation and maintenance of its sewer system as the same affected the Warwick River; and (3) such negligence was a proximate cause of conditions requiring the closure of the Warwick River.

The City thereafter filed a motion for

3-continued:
for its outfall line, and that the buffer zone had been established by the State Health Commissioner under the authority of §28.1-175 et seq., of the Virginia Code, the court held that teh closure was an appropriate exercise of the State's police power and did not constitute a taking of the plaintiffs' property by the Commission.

State Health Commissioner closed for the direct marketing of oysters and other shell fish (in accordance with Food and Drug Administration requirements) a buffer zone around the outfall opening.[2]

The case came on for trial before a jury on issues of liability, issues of damages being reserved. At the conclusion of plaintiffs' evidence the district judge directed a verdict in favor of defendant Commission, ruling that no case against it had been proved on any ground.[3] At the judgment n.o.v. which the district judge granted on the grounds that the action against the City is barred (1) by the doctrine of sovereign immunity, and (2) by the failure of the plaintiffs to give the City the 60-day statutory notice of their claims provided for in Va. Ann. Code, 1957 Repl. Vol., §8-653, as it read before the 1973 amendment thereto.[4] Plaintiffs' appeal challenges both of these rulings, as well as the district court's ruling that there was no exercise of eminent domain by the Commission. Before resolving these questions, we will discuss the issue raised by defendants'

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[2] The Health Commissioner acted under the provisions of Va. Ann. Code, 1973 Repl. Vol., §28.1-175 et seq.

[3] The court noted that there had been no evidence that the Commission had been guilty of any negligence or that its plant had overflowed or functioned improperly. The plaintiffs conceded these points but contended that the buffer zone which had been established around the area of the plant's outfall constituted an unconstitutional taking of their property without compensation. Observing that the Commission in exercise of its power of eminent domain had paid for that part of the river bottom which was physically used

cross-appeals (see no. 1 above).

The City and the Commission challenge the ruling of the district court that there is no longer an unqualified public right to discharge sewage into tidal streams. The Commission argues that it has not been shown to have violated any provision of Virginia Law governing water pollution, and therefore the closing of oyster grounds by the State Health Commissioner due to a pollution hazard was a risk to which the lessees were subject when they took their leases. The City argues that occasional discharges of untreated sewage into the Warwick River do not violate the legislative policy against pollution, and that the oystermen took their leases subject to the risk of such occasional discharges.

The common law right of the public to dump sewage in tidal streams was recognized in a line of cases applying Virginia law decided during the period 1916 to 1939. Hampton v. Watson, 119 Va. 95, 89 S.E. 81 (1916); Darling v. Newport News, 123 Va. 14, 96 S.E. 307 (1918), aff'd 249 U.S. 540 (1919); Commonwealth ex rel. Atty. Gen. v. Newport News, 158 Va.521, 164 S.E. 689 (1932); DuPont Rayon Co., Inc. v. Richmond Industries, Inc., 85 F.2d 981 (4th Cir. 1936); Old Dominion Land Co. v. Warwick County, 172 Va. 160, 200 S.E. 619 (1939). In Darling, the Supreme Court, speaking through Justice Holmes, agreed with the Virginia court that "when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water". 249 U.S. at 543. The Court held that the grant was subject to the right of the State to authorize the City of Newport News to discharge its sewage into the Roads, and that the consequent pollution of the plaintiff's

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[4] In considering the post-verdict motion, the court referred to the evidence that certain pumping stations in the sewage collection lines operated by the City had permitted raw sewage to overflow during the period 1970-72. While these pumping stations were located some four to five miles from the oyster beds which were closed in 1972, the court properly concluded that there was evidence from which the jury could find that these overflows were the source of the high coliform count which resulted in the closure.

oysters was neither a taking of his property without due process nor an impairment of his contract rights.

Since 1939, however, Virginia has imposed ever-stronger controls on the discharge of sewage into state waters. A Virginia statute now prohibits the discharge of raw sewage into such waters. Va. Ann. Code, 1973 Repl. Vol., §62.1-44.5. We conclude that whether or not the discharges of raw sewage by the City can be characterized as occasional, they are not now protected by the public policy of the State, and plaintiffs' rights to cultivate oysters are not subject to a right of the City to violate state law.[5]

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[5] The City argues that occasional discharges are permitted by Va. Ann. Code, 1973 Repl. Vol., §62.1-44.4 (2), which requires the maintenance of high water quality only "where physically and economically feasible". Section 44.4 (2) applies only to water whose quality is "better than the established standards as of the date on

The Commission, however, has not been shown to have violated any statutory or regulatory provision. The public right to discharge sewage into the Warwick has been qualified by the legislature only to the extent provided by the pollution control statutes. The Commission, in exercising its statutory right to discharge treated sewage into the Warwick, abridged no rights of the plaintiffs, who took their leases subject to the risk of closure due to lawful discharges.

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[5]-continued:
which such standards become effective***". Although the precise standards set for the Warwick River by the State Water Control Board are not in the record, the Board is required to adopt standards consistent with the general policy of that statute, which protects aquatic life, inter alia, from the detrimental effects of pollution. Va. Ann. Code, §62.1-44.5 (2). The water quality of the Warwick has not been shown to be above any legitimate standards set by the Water Control Board; therefore, Virginia law prohibits such "occasional" discharges of raw sewage as the City caused in this case.

Because we agree with the district judge that there was no evidence sufficient to prove a case against the Commission on grounds of negligence, nuisance or a taking by the Commission, the judgment in its favor must be affirmed, whether Virginia law or admiralty principles should be applied.[6] The case against the City, however, requires us to consider whether its liability on grounds of negligence, nuisance and eminent domain is controlled by Virginia law, maritime law or other federal law.

The Warwick River in the area of the beds involved in this case is a navigable stream, subject to the ebb and flow of the tides. Harvesting oysters and clams, like fishing, is a traditional maritime activity; the cultivation of oysters is so closely related to the harvesting of oysters that interference with cultivation which impairs harvesting also meets the situs and nexus tests established by Executive Jet Aviation V. Cleveland, 409 U.S. 249 (1972), and comes within the admiralty and maritime jurisdiction. Union Oil Co. v. Oppen, 501 F.2d 558, 560-63 (9th Cir. 1974); Potomac River Ass'n Inc., v. Lundeberg Md. Sea. Sch., Inc., 402 F. Supp. 344, 358 (D.Md.1975); Burgess v. M/V Tamano, 370 F. Supp. 247 (D.Me.1973); State Dept. of Fish and Game v. S.S. Bournemouth, 307 F. Supp. 922 (C.D.Calif. 1969((decided prior to Executive Jet).[7]

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[6] The closing of the beds was ordered by the State Health Commissioner, acting under the police power of the Commonwealth. Defendant Hampton Roads Sanitary Commission had no authority to order such closure.

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[7] The Submerged Lands Act, 43 U.S.C. 1301 et seq., recognized in §1311 (a) the right of the several states to manage, administer, lease, develop and use lands beneath the navigable waters within the boundaries of each state in accordance with applicable State law, but provided in §1311 (d) that

Whether in a particular case an admiralty court will adopt state law or fashion its own principles for application depends upon whether the adoption of state law would impair the uniformity of admiralty law, and whether there is some admiralty principle which preempts state law. Workman v. New York City, 179 U.S. 552 (1900); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974); In re M/T Alva Cape, 405 F.2d 962 (2nd Cir. 1969).

All of the parties in this case are Virginians; there is no such interstate problem as was involved in Illinois v. Milwaukee, 406 U.S. 91 (1972), and Texas v. Pankey, 441 F.2d 236 (10th Cir.1971). Cf. Committee for the Consideration of the Jones Falls Sewage System v. Train, ____

7-continued:
nothing in the Act should affect the control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation.

F.2d _______(4th Cir. 1976). The absence of any interstate factor reduces but does not eliminate the importance of the uniformity element in the decision.

Virginia law controls the construction of the Virginia statutes and the nature and extent of the rights which plaintiffs acquired under their leases. The problem is whether Virginia law should control (1) the question whether the City is immune from liability in such a suit as this and (2) the applicability to this case of the requirement of notice contained in §8-653 of the Virginia Code, the two points upon which the district judge based his decision to enter a judgment n.o.v. in favor of the City.

Under Virginia law a City is immune from liability for negligence in performing governmental functions, but not for negligence in performing proprietary functions. Fenon v. City of Norfolk,

203 Va. 551, 125 S.E. 2d 808(1962). However, the Virginia law with respect to which activites of a municipal corporation are governmental and which are proprietary is far from clear. Taylor v. City of Newport News, 214 Va. 9, 197 S.E. 2d 209 (1973) (collection of garbage held to be a governmental activity); Fenon v. City of Norfolk, supra (removal of fallen trees from streets after a hurrican is governmental activity); City of Norfolk v. Hall, 175 Va. 545, 9 S.E. 2d 356 (1940) (maintenance of public streets and sidewalks is proprietary activity); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of swimming pool is proprietary activity); Ashbury v. City of Norfolk, 152 Va. 278, 147 S.E. 223 (1929) (removal of garbage by municipality is governmental activity).

On the other hand, the weight of admiralty authority which has been cited or found is in line with those state decisions which have increasingly repudiated or narrowed the immunity of municipal corporations when performing governmental functions. Workman v. New York City, 179 U.S. 552 (1900); In re M/T Alva Cape, 405 F.2d 962 (2nd Cir. 1969): Principe Compania Naviera, S.A. v. Board of Commissioners, 333 F. Supp. 353 (E.D. La. 1971); Kelley Island Lime & Transport Co. v. City of Cleveland, 47 F. Supp. 533 (N.D. Ohio 1942); 1 Benedict on Admiralty, 7th Ed., (1974), §112, at 7-37 et seq. Cf. J. Ray McDermott & Co., Inc. v. Department of Highways, State of La., 267 F. 2d 317 (5th Cir. 1959); Broward County, Fla. v. Wickman, 195 F.2d 614 (5th Cir. 1952). For a full review of state cases, see Long v. City of Wierton, 214 S.E. 2d 832 (W.Va. 1975).

We have grave doubts whether, in the light of the most recent Virginia cases,

the Virginia court would extend immunity to the City in such a case as this. It is not necessary to decide that question, because we conclude that maritime law principles should be applied, and that, applying those principles, the City is not immune from liability for such negligence as has been shown in this case.

There remains the question whether plaintiffs' claims are barred by their failure to give notice to the City within 60 days after the respective causes of action accrued. Here again, we conclude that maritime law principles should control and that the issue should be decided by applying the doctrine of laches rather than by applying the 60 day notice statute.[8] Since all facts with respect to laches may not have been fully developed in the district court, evidence and argument with respect thereto should be considered by the district judge on remand.

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[8] In the following cases admiralty courts have refused to apply state notice statutes in a variety of situations: Raymond International v. M/T Dalzellegle, 336 F. Supp. 679 (S.D.N.Y.1971); Fematt v. Los Angeles, 196 F. Supp. 89 (S.D.Calif. 1961); Morales

The district judge concluded that the City was not maintaining a nuisance. Even if that conclusion were not correct, plaintiffs would not be entitled to an injunction against the City's operation of its sewage system, and the damages, if any, to which a plaintiff might be entitled would not exceed the damages recoverable for negligence.

The judgment in favor of the defendant Commission is affirmed.

The judgment in favr of of the defendant City is reversed and the case is remanded for further proceedings consistent

with this opinion.

Affirmed in part,
reversed in part, and
remanded.

FIELD, Senior Circuit Judge, concurring
in part;
dissenting in part.

While I agree with much that is in the majority opinion, I cannot concur with my brothers in their conclusion that the destruction of the plaintiff's oyster beds was a maritime tort in falling within the admiralty jurisdiction of the court. My reading of Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), indicates that the maritime nexus requisite for admiralty jurisdiction is a "relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters." (Emphasis added) Id., at 256. We recognized the restrictive nature of such a nexus in declining admiralty jurisdic-

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8-continued:
v. Galveston, 181 F. Supp. 202 (S.D. Tex. 1959), aff'd on other grounds, 370 U.S. 165 (1962); The West Point, 71 F. Supp. 206 (E.D. Va. 1947); Frame v. New York, 34 F. Supp. 194 (S.D.N.Y. 1940).

tion of the aquatic accidents in Crosson v. Vance, 484 F.2d 840 (4 Cir. 1973), and Onley v. South Carolina Electric & Gas Co., 488 F. 2d 758 (4 Cir. 1973), and in my opinion the cultivation of oysters is not a traditional form of maritime commerce and navigation which would support admiralty jurisdiction in this case. I think my conclusion on this point is consonant with the jurisdictional philosophy of Executive Jet, but it does not rest on that alone for it is based upon decisions of the Court extending back well into the last century.

In Smith v. Maryland, 59 U.S. 71 (1855), a Maryland statute regulating the harvesting of oysters in its waters was challenged on the grounds that it was repugnant to the commerce clause of the Constitution and conflicted with the admiralty jurisdiction of the United States. In upholding the statute, the Court noted

that "(w)hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, ***." Id., at 74. On the question of admiralty jurisdiction the Court said:

> "But we consider it to have been settled by this court in United States v. Bevans, 3 Wheat 386, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." Id., at 76.

Some years later in McCready v. Virginia, 94 U.S. 391 (1876), the Court had occasion to consider the authority of

Virginia to regulate oyster cultivation in its tidal rivers. Again recognizing that each state owns the beds of all tidal waters within its jurisdiction, the Court stated:

> "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, * * *." Id., at 394-395.

Concluding that the Virginia statute did not violate the commerce clause, the Court observed that "(t)here is here no question of transportation or exchange of commodities, but only of cultivation and production." Id., at 396. The jurisdictional principles of Smith and McCready were recognized and reaffirmed in Manchester v. Massachusetts, 139 U.S. 240 (1891).

Additionally, the authority of the

states over shellfish cultivation was specifically recognized by the Congress in the Submerged Lands Act of 1953, 43 U.S.C. §1301, et seq.[9] The construction and application of this legislation has been consistent with the venerable decisions upon which I rely, and in Corsa v. Tawes, 149 F.Supp. 771 (D.Md. 1957), aff'd. 335 U.S. 37, Judge Sobeloff discerned the legislative purpose as follows:

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[9] 43 U.S.C. §1311(a) reads in pertinent part as follows:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use such lands and natural resources all in accordance with applicable State law be, * * *vested in and assigned to the respective states."

Oysters are included within the term "natural resources" as defined in the Act. 43 U.S.C. § 1301(e).

> "Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit in the Submerged Lands Act of 1953." Id., at 773.

While it is true that the Act provides that nothing in it shall affect the Constitutional rights of the United States to regulate or improve navigation or to provide for flood control or the production of power,[10] none of these rights so reserved have any operative bearing upon the case before us.

In the light of this legislation and the decisions of the Court, I think it is clear that the cultivation of oysters in the Warwick River was a purely local activity subject to the laws and jurisdiction of the State of Virginia, and that

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[10] 43 U.S.C. § 1311 (d).

the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort.[11] Under these circumstances, the plaintiffs do not fall within the admiralty exception to the statutory notice requirement, and their failure to comply therewith barred their cause of action against the City.

On Petition for Rehearing En Banc

Before HAYNSWORTH, Chief Judge WINTER, CRAVEN, BUTZNER and RUSSELL, Circuit Judges FIELD, Senior Circuit Judge, WIDENER and HALL, Circuit Judges, sitting en banc.

Reargued: March 15, 1977
Decided: July 13, 1977

FIELD, Senior Circuit Judge:

The plaintiffs filed this action charging that their oyster beds leased to them by the Commonwealth of Virginia had been destroyed as the result of the improper operation of a sewage disposal system by the defendants, City of Newport News (City) and Hampton Roads Sanitation Commission (Commission). Jurisdiction was asserted under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1333 (admiralty and maritime jurisdiction). The district court entered final judgment in favor of the defendants and the plaintiffs have appealed.

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[11] The cases cited by the majority in support of its position on this point are not entirely opposite since each of them involved oil spills and liability was premised upon specific federal legislation, e.g., Rivers and Harbors Act of 1899, 33

At the close of the plaintiffs' evidence the district court granted the Commission's motion for a directed verdict upon the ground that there was no evidence of negligence or other conduct on its part which would give rise to any liability.

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11 (cont.) U.S.C. §407; Water Quality Improvement Act, 33 U.S.C. §1161(b)(2); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.

The trial continued with respect to the City and the jury found it guilty of actionable negligence. Despite the jury's finding, the court granted the City's motion for judgment n.o.v., concluding that the doctrine of sovereign immunity relieved it from liability from any negligent conduct. Alternatively, the court found that the failure of the plaintiffs to give the sixty day statutory notice of their claims as required by Section 8-653, Va. Ann. Code, 1957 Repl. Vol.,[1] barred them from recovery. Upon appeal the plaintiffs challenged the conclusion of the district court upon both of these issues.

When this appeal was initially heard a majority of the panel concluded that this case fell within the admiralty and maritime jurisdiction of the court, and that under the weight of admiralty authority neither the Virginia doctrine of sovereign immunity nor the statutory notice requirement would bar the plaintiffs from recovery.[2] Rehearing en banc was ordered for consideration of the admiralty jurisdiction issue.

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[1] Section 8-653 was amended in 1973 but the plaintiffs' claims are governed by the statute as it stood prior to the amendment.

In finding that there was admiralty jurisdiction the panel majority observed that, like fishing, the harvesting of oysters is a traditionally maritime activity, and that the cultivation of oysters is so closely related to the harvesting that any interference therewith meets the situs and nexus test of Executive Jet Avaiation v. Cleveland, 409 U.S. 249 (1972). We are unable to agree, however, that the present case should be viewed in

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[2] Moore v. Hampton Roads Sanitation Commission, Nos. 75-1576,77,78 (4 Cir., October 7, 1976),_____F. 2d_____.

the perspective of the entire spectrum of the oystering industry. Rather, in our opinion, the interests of the plaintiffs are purely local in their nature, and any alleged impairment thereof falls within the jurisdiction of the state and not the admiralty jurisdiction of the federal courts.

As heretofore stated, the plaintiffs' property rights in the oyster beds were dervied by leases from the State of Virginia. Recognition of the sovereignty and title of the states to lands underlying navigable waters within their boundaries goes back to the early days of the Republic. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The title of the state to such lands stems from the Constitution itself, and the nature of such ownership was stated in Weber v. Harbor Commissioners, 85 U.S. (18 Wall) 57, 65-66 (1873):

> "Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters * * * (Emphasis added)

The sovereignty and jurisdiction of the states was recognized in Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) where a Maryland statute regulating the harvesting of oysters in its waters was challenged on the grounds that it was repugnant to the commerce clause of the Constitution and conflicted with the admiralty jurisdiction of the United States. In upholding the statute, the Court noted that "(w)hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil

by the State, * * *." Id., at 74. On the question of admiralty jurisdiction, the Court said:

> "But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." Id., at 76.

Some years later in McCready v. Virginia, 94 U.S. (IV Otto) 391 (1876), the Court had occasion to consider the authority of Virginia to regulate oyster cultivation in its tidal rivers, and the purely local nature of such cultivation was stated as follows:

> "The planting of oysters in the soil covered by water owned in common by the people of the State is not

> in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water." Id., at 396.

Concluding that the Virginia legislation did not violate the commerce clause the Court observed that "(t)here is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." Id., at 396.

In the light of these authorities, we think it is clear that the cultivation of oysters by the plaintiffs under leases from the State of Virginia is a purely local activity subject to the laws and

jurisdiction of the state[3], and that the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort. Our holding is, of course, a narrow one for we recognize that many activities incident to the harvesting of oysters may properly be the subject of admiralty. Concededly, a collision involving an oyster boat or injury to a crewman on board such a vessel is as "traditionally maritime" as any other commercial activity involving the use and operation of vessels on navigable waters. However, damage to the plaintiffs' leaseholds from sewage discharges is not, in our opinion, related to the maritime aspects of the oystering industry.

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[3] The authority of the states over shellfish cultivation was explicitly recognized by the Congress in the Submerged Lands Act of 1943, 43 U.S.C. § 1301, et seq.

43 U.S.C. § 1311(a) reads in pertinent part as follows:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use such lands and natural resources all in accordance with applicable State law be* * *vested in and assigned to the respective States* * *."

Oysters are included within the term "natural resources" as defined in the Act. 43 U.S.C. § 1301(e).

The judgment of the district court is affirmed.

AFFIRMED.

I hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of The United States that I mailed a true and correct copy of the foregoing to all Counsel of Record by depositing the same in a United States Mailbox, with First Class Postage Prepaid, addressed to Counsel of Record at his Post Office Address this 11 TH day of October, 1977.

William Mills Krieger

William Mills Krieger

Supreme Court, U.S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

BRIEF ON BEHALF OF HAMPTON ROADS SANITATION DISTRICT COMMISSION IN OPPOSITION TO WRIT OF CERTIORARI

In The

Supreme Court of the United States

October Term, 1977

No. 77-540

WILLIAM A. MOORE, ET AL.,
Petitioners,

v.

HAMPTON ROADS SANITATION
DISTRICT COMMISSION AND
CITY OF NEWPORT NEWS,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

HAMPTON ROADS SANITATION DISTRICT COMMISSION'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

JURISDICTION

The jurisdictional statement of the petitioner is incomplete and inaccurate.[1] At the conclusion of the Plaintiff's evidence before the jury on June 3, 1974 the District Court granted the Defendant, Hampton Roads Sanitation District Commission's (sometimes hereafter referred to as HRSDC) motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Following the jury's responses to the special interrogatories, the District Court entered a judgment *non obstante veredicto* in favor of the Defendant, City of Newport News, on March 10, 1975. From this opinion the petitioners appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit three-judge panel's opinion affirming as to the Defendant, Hampton Roads Sanitation District Commission and reversing the District Court as to the City of Newport News is dated October 7, 1976. The City of Newport News asked the Fourth Circuit for a hearing *en banc,* and the same was granted as to the question involving the City on November 24, 1976. The Fourth Circuit's opinion reversing its panel and affirming the District Court's opinion as to the City is dated July 13, 1977.

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[1] The Petitioners' writ says it seeks review of the District Court's opinion. That is obviously incorrect.

QUESTIONS PRESENTED[2]

III

Does The Imposition Of A Valid Restriction On The Use Of Petitioners' Oyster Beds By The Virginia State Department Of Health Require Hampton Roads Sanitation District Commission To Condemn The Petitioners' Leasehold Interest Pursuant To Either The Fifth Amendment Of The United States Constitution of Article I § 11 Of The Virginia Constitution?[3]

STATEMENT OF THE CASE

In September of 1972 this suit was instituted in District Court by ten leasees of oyster beds in the Warwick River against Hampton Roads Sanitation District Commission, (hereinafter "HRSDC") and the City of Newport News.[4] HRSDC is a political subdivision of the Commonwealth of

Virginia charged with the collection and removal of sewage in the Hampton Roads area of Virginia.

As to the HRSDC, the complaint charged:[5]

1. That the James River sewage Treatment Plant is constructed so that its main discharge pipe empties into the Warwick River, causing the area surrounding said pipe to be condemned for the purpose of harvesting and marketing shellfish; said area being called a "buffer zone;"
2. That the requirement for the "buffer zone" was or should have been known to the Hampton Roads Sanitation District Commission at the time of the design and installation of said James River Sewage Treatment Plant;
3. That the creation of said "buffer zone" destroyed the use of said grounds for the harvesting and marketing of shellfish, making said grounds worthless;
4. That the conversion of said grounds into a state of worthlessness was done without the benefit of due process, and said conversion was for the purpose of enabling Hampton Roads Sanitation District Commission to fulfill its purpose as a public authority;
5. That the drainage from the James River Sewage Treatment Plant contains high amounts of bacteria, viruses, and other pollutants which have destroyed the value of Plaintiff's oyster grounds and the oysters thereon;
6. That the presence of said pollutants are proximately and solely the result of the negligence and willful failure of Hampton Roads Sanitation Commission to properly treat and process the sewage as it flows through its plant.

At trial plaintiffs abandoned all previous allegations of negligence in any form against HRSDC. In fact, plaintiffs' expert testified that the treatment and processing of the sewage was proper and in no way contributed to any of the pollutants in the Warwick River. (Trial Transcript 82) At the conclusion of Plaintiffs' evidence the Court sustained HRSDC's motion for a directed verdict and later expanded in its opinion following trial on its reasons for doing so.

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[2] The first two questions posed by the petitioners do not concern HRSDC as they go to the tort liability of the defendant. The petitioner admits HRSDC is not negligent.

[3] The question posed is inappropriate. The evidence establishes that HRSDC had nothing to do with contamination of the river. The river was not condemned, that is what is sought in this appeal.

[4] A number of other Plaintiffs intervened in this District Court suit. These Plaintiffs did not note an appeal to the Fourth Circuit and it is the Respondent's position that they are not now before this Court.

[5] See complaint paragraphs 7, 8, 11, 12, 13, and 14, et als.

> It was apparent at the conclusion of plaintiff's evidence that no evidence had been developed in any way to show that Hampton Roads was guilty of any negligence whatsoever. There was no evidence that the James River Plant of Hampton Roads had overflowed or had functioned improperly or that untreated affluent pollutants had been deposited in the Warwick River through any action of Hampton Roads. The Plaintiffs agreed to this and acknowledged on the record that their only claim against Hampton Roads was under the Fifth and Fourteenth Amendments. They argued that a buffer zone against the harvesting of oysters which had been established around the area of the James River Disposal Plant outfall by the State Department of Health was a taking by Hampton Roads without compensation under the Fifth and Fourteenth Amendments. No evidence was produced that Hampton Roads had anything to do with the creation of that buffer zone. It was established by the State Health Department under health standards and authority extant since the 1930's. Hampton Roads had exercised its power of eminent domain to condemn and pay for that part of the bottom that it was physically using for its outfall line.
>
> The action of the State Board of Health in Shellfish Restrictive Order No. 55, establishing the buffer zone at the outfall of Hampton Roads' James River sewerage disposal plant, was pursuant to Section 28.1-175, Code of Virginia, 1950, Amended.
>
> Similar action closing the identical area of the Warwick River had been directed by the State Board of Health under authority of the same statute on many occasions prior to the opening of the James River plant in 1967. The entire River had been closed in 1942 and again in 1962.
>
> No attack on the constitutionality of Title 28.1 of the Virginia Code affecting shellfish, nor to the health standards thereunder, was raised by the plaintiffs in this suit. There was no evidence that any plaintiff had availed himself of the express provisions of Title 28.1-178, Code of Virginia, 1950, Amended, to have the restriction released.
>
> The provisions of Title 28.1-175 of the Code of Virginia protecting the health of the public are an undoubted proper exercise of the police power of the State. (Appendix pp. 7-10)

On those facts the Fourth Circuit panel had no trouble affirming the District Court.

> The Commission, however, has not been shown to have violated any statutory or regulatory provision. The public right to discharge sewage into the Warwick has been qualified by the legislature only to the extent provided by the pollution control statutes. The Commission, in exercising its statutory right to discharge treated sewage into the Warwick, abridged no rights of the plaintiffs, who took their leases subject to the risk of closure due to lawful discharges. (Appendix p. 41)

The City of Newport News asked for a rehearing *en banc* which was granted to decide the question of admiralty jurisdiction, an issue having no application to the claim against HRSDC.

It is important to understand that the "buffer zone" established by the State Department of Health does not make the harvesting of oysters impossible. The effect of such an order is that oysters would have to be harvested from their home ground and relayed to an unclosed portion of a river for a period of fifteen days before the oysters could be directly sold to the market. Thus, at best, a limitation on the use of property is at issue in this case, not the taking of property as claimed by the Petitioners.

SUMMARY OF ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

This Court's Rule 19 requires that the Petitioners set forth "special and important reasons" as to why the Court should grant the writ. HRSDC thinks it apparent on the face of the writ that even the Petitioners do not believe that there are any special or important reasons for the writ to be granted as to HRSDC. The only question which the Petitioners present that in anywise reaches the issues posed in this cause against the HRSDC is the third question (Petition, page 3). Even that question does not fairly represent or state the appropriate issue raised by the case (see page 3, *infra.*). Furthermore, the statement of the facts (Petition, 7-8) is a misstatement and incomplete.

In a petition for certiorari that is 78 pages long, the Petitioners do not get around to the case against HRSDC until page 72, and then only devote four pages to its argument. No authority is cited in support of the proposition that either the District Court or Court of Appeals was wrong.

In addition to Petitioners' own Petition making it apparent that there are no "special and important reasons" for granting this writ, it is also readily apparent that the case is properly decided. There is no argument that HRSDC had anything to do with the creation of the buffer zone.

The Fourth Circuit noted that the public's right to discharge sewage into the Warwick River was qualified only to the extent provided by the pollution control statutes and that there had been no evidence that any such statute had been violated.

Furthermore, the decision of this Court laid to rest any suggestion that there had been a taking which is compensable under the Fifth and Fourteenth Amendments, *Sanguinetti* v. *United States,* 264 U. S. 146 (1924). The law in Virginia is that the proper exercise of the police power is not a taking for which compensation need be paid. *The Weber City Sanitation Commission* v. *Craft,* 196 Va. 1140, 87 S.E. 2d 153 (1950). The Virginia law is in complete accordance with the Federal law as expressed by this Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 8 L.Ed. 2nd 130, 82 S. Ct. 987 (1962).

ARGUMENT

The Law Was Appropriately Applied By All The Courts In Finding That The Restrictions Placed On The Use Of Petitioners' Leaseholds Were A Proper Exercise Of The Police Power For Which The Petitioners Cannot Demand Compensation.

Though the Petitioners would have you believe that the creation of the buffer zone was somehow done pursuant to Federal Drug Administration requirements (Petition, 7), that is simply a misstatement. As the District Court pointed out, the buffer zone was created by the Commonwealth of Virginia's State Department of Health pursuant to statutory authority which had been in existence since the 1930's. Any suggestion to the contrary is inaccurate and inappropriate.

It has been established law in Virginia for over five decades that the public, acting through its legislature, may use its waters as part of its sewage disposal system. *Darling* v. *City of Newport News,* 123 Va. 14, 96 S.E. 307 aff'd., 249 U.S. 540 (1918); *Hampton* v. *Watson,* 119 Va. 95, 89 S.E. 81 (1916); *Commonwealth* v. *City of Newport News,* 158

Va. 521, 164 S.E. 689 (1932); *Old Dominion Land Company* v. *Warwick County,* 172 Va. 160, 200 S.E. 619 (1939) and *Du Pont Rayon Company* v. *Richmond Industries,* 85 F.2d 981 (4th Cir. 1936). For an equally long time it has been unquestioned that a lessee of oyster beds holds his lease subject to the right of a governmental agency to discharge sewage in navigable streams. *Id.*

Petitioners ignore that proposition and argue that since HRSDC knew some oyster grounds would be closed for direct marketing by the State Health Department, it should have taken steps to condemn those lands. This argument lacks force for the additional reason that such a restriction on the direct marketing of oysters does not require condemnation by HRSDC. As this Court said in *Sanguinetti* v. *United States,* 246 U.S. 146 (1924):

> In order to create an enforceable liability against the government, it is, at least, necessary that the overflow be the direct result of the structure; and constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property. *Id.* at 149.

The question of whether there is a taking is answered by the facts. The creation of the buffer zone has nothing to do with the invasion of Petitioners' property by HRSDC. The facts show the buffer zone was established by another State governmental agency in contemplation of what possibly could occur, certainly not what probably would occur. The effluent discharged by HRSDC into the receiving waters has not been shown to have interfered with the use of Petitioners' oyster leases in any way. Thus, within the *Sanguinetti* test there was no actual invasion of the ground. Certainly nothing HRSDC has been shown to do amounts to an appropriation of Petitioners' property. Petitioners are really arguing that the injury caused by the creation of the buffer zone is so great that it amounts to a taking. While the facts will not support that, even if they did, that is an injury not caused by HRSDC.

The facts show that prior to the establishment of the buffer zone, these oyster bottoms had been subject to the same type of closing orders. Further, the facts are undisputed that it was only a matter of time before these grounds would have been closed from the natural pollution of the river. And most convincingly, the evidence is that Warwick River would most probably have been closed in 1972 even if the James River Sewage Treatment Plant was not there.

Thus, if the number of closings or their duration were increased or prolonged by the construction of the James River Sewage Treatment Plant, such is a matter of pure conjecture. At best, the creation of the buffer zone regulated the use of these oyster beds earlier than they might have otherwise been regulated. As the *Sanguinetti* court put it:

> The most that can be said is that there was probably some increased flooding, due to the canal, and that a greater injury may have resulted than otherwise would have been the case. But this and other matters aside, the injury was, in its nature, indirect and consequential, for which no implied obligation on the part of the government can arise. *Id.*, 150.

The creation of the buffer zone by a governmental agency over which HRSDC has no control was an indirect and consequential injury for which, if there is recourse, the Petitioners must look to the State Department of Health and not HRSDC.

Even if HRSDC is the responsible party, it is likewise clear that no exercise of the power of eminent domain was required by the establishment of the buffer zone. The Court must remember that the only damages suffered by the Petitioners, if there by any, are marked by the closing of the Warwick River by the State Department of Health. If the closings were proper, it is axiomatic that such was a proper exercise of the police power for which no compensation need be paid. *The Weber City Sanitation Commission* v. *Craft,* 196 Va. 1140 (1955).

Thus, the sole question becomes whether the establishment of the closed areas was an exercise of the police power (for which no compensation need be paid) or was an exercise of the power of eminent domain (for which compensation must be paid). In Virginia, the answer that the creation of the buffer zone is a proper exercise of the police power is easy. The Virginia Supreme Court said in *The Weber City Sanitation Commission,* op. cit., 1150-51:

> Thus, while . . . taking water for domestic or agricultural purposes . . . and the cutting and taking of ice are lawful . . . on such water to which a party lawfully has access, all of these avocations and pursuits may be restricted or prohibited when public health demands a restriction or prohibition. . . . A statute empowering a state board of health to prohibit the use of water or ice from any given source where, in the opinion of the board, the use thereof endangers the public health is valid, and does not offend against the constitutional provision respecting personal liberty.

Likewise, the case of *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) puts beyond question any issue as to whether the creation of the buffer zone was an exercise of the police power. In the *Goldblatt* case the City brought an action to enforce its 1958 ordinance prohibiting excavations below two feet above the maximum ground water level. Goldblatt defended on the grounds that he had been engaged in dredging and pit excavating on a 38-acre tract

within the town continuously since 1927 and that such a regulation took his property without due process of law. The Supreme Court unanimously upheld the City's regulation as a valid exercise of the police power. Its words are instructive and dispositive of this case.

> Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . . As pointed out in *Mugler* v. *Kansas,* (123 U.S. 623, 668, 669):
>
> (T)he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted,

> by a noxious use of their property, to inflict injury upon the community.
>
> Nor is it of controlling significance that the "use" prohibited here is of the soil itself as opposed to a "use" upon the soil, or that the use prohibited is arguably not a common-law nuisance. . . .

This is precisely the situation with which the oystermen have been faced. The creation of the buffer zone by the State Health Department means nothing more than that the oysters on Petitioners' oyster beds are not available for direct marketing (Trial Transcript, 149), but rather have to be replanted for 15 days before they can be marketed (Trial Transcript, 150-151).

The Petitioners concede that this argument is "undisputed" (Petition, 74). Petitioners try to escape this dilemma by citing *Nichols* out of context (Petition, 74-75) and engaging in a bit of sophistry. They argue since HRSDC caused the State to exercise its police power, HRSDC is now liable for failing to exercise its power of eminent domain. This they say is true because, but for the existence of the outfall line, the Warwick River was "made subject to laws which it was subject before. . . ." The argument is nonsense. Factually, the Petitioners have always been subject to this police power regulation; hence the principle, even if appropriate, has no application here. Legally, it is without merit to argue that what the State Health Department or HRSDC could do alone, they cannot do together.

CONCLUSION

For the reasons stated herein the writ of certiorari should not be granted.

Respectfully submitted,

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Supreme Court, U. S.
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BRIEF ON BEHALF OF CITY OF NEWPORT NEWS IN OPPOSITION TO WRIT OF CERTIORARI

In The

Supreme Court of the United States

October Term, 1977

No. 77-540

WILLIAM A. MOORE, ET AL.,
Petitioners,

v.

HAMPTON ROADS SANITATION
DISTRICT COMMISSION
AND
CITY OF NEWPORT NEWS,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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WILLIAM A. MOORE, ET AL.,
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v.
HAMPTON ROADS SANITATION DISTRICT COMMISSION
AND
CITY OF NEWPORT NEWS,
Respondents.

CITY OF NEWPORT NEWS BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

JURISDICTION

The jurisdictional statement of the petitioner is incomplete and inaccurate.[1] At the conclusion of the Plaintiff's evidence on June 3, 1974 before the jury the District Court granted the Defendant, Hampton Roads Sanitation District Commission's (sometimes hereafter referred to as HRSDC) motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Following the jury's responses to the special interrogatories, the District

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[1] The Petitioners' writ says it seeks review of the District Court's opinion. That is obviously incorrect.

Court entered a judgment *non obstante veridicto* in favor of the Defendant, City of Newport News, on March 10, 1975. From this opinion the petitioners appealed to the Fourth Circuit Court of Appeals. The three-judge panel of the Fourth Circuit affirmed to the District Court as to HRSDC, but reversed as to the City of Newport News in an opinion dated October 7, 1976. The City of Newport News asked the Fourth Circuit for a hearing *en banc,* which motion was granted for consideration of the admiralty jurisdiction issue on November 24, 1976. The opinion of the full Fourth Circuit reversing its panel and affirming the District Court's opinion as to the City is dated July 13, 1977.

QUESTIONS PRESENTED[2]

Should The Law Of Admiralty Be Called Into Play Under The Principles Of Executive Jet To Govern The Rights And Duties Of The Parties When A Municipality Of A State Is Negligent In The Operation Of A Sewage Collection System, And Overflows Therefrom Occurring On Dry Land Eventually Impact On The Use Of Oyster Beds Leased By The Petitioners From The State Or Should That Situation Be Controlled By The Laws and Jurisdiction Of The State.

STATEMENT OF THE CASE

Petitioners are leasees of oyster beds in the Warwick River. If all goes well, oysters will grow on those beds to be harvested by the Petitioner, his employee or a subtenant.

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[2] Respondent believes the questions presented by the petitioner misstate the issues. The issue is whether the interference to fishing operations caused by a sewage overflow to oyster beds leased from a State bears a significant "relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters" so as to invoke the principles of admiralty. Respondent must concede that commercial fishing operations on navigable waters generally bear a significant relationship to traditional maritime activity. That question, however, does not advance this cause any closer to the key issue.

There are two types of harvesting: direct or indirect. Direct harvesting means that the waterman is free to pick up the oyster from the bed and sell it directly to market. Indirect harvesting requires the waterman to transplant the oyster to another bed for fifteen days before it can be sold to market.

Sometimes because of the condition of the water, a shellfish area is closed by the Virginia State Department of Health to the direct marketing of oysters, thus, necessitating indirect harvesting (called relaying). For over thirty years parts of the Warwick River have from time to time been closed. The City of Newport News operates and maintains pumping stations, which collect and pump sewage from individual households and businesses into the main feeder lines operated by the Hampton Roads Sanitation District Commission (hereafter "HRSDC"). Petitioners brought suit against the City of Newport News and HRSDC alleging that their joint and concurring negligence had polluted the River, thus, causing the State Department of Health to close the River to direct marketing. At trial, the petitioners abandoned all allegations of negligence on the part of HRSDC, laying the full blame at the feet of the City.

The evidence disclosed that the first closing of the Warwick River by the State Department of Health occurred on December 16, 1942. (Trial Transcript 139). At that time the entire Warwick River was closed. The river remained that way until June 21, 1946, when the condemnation was lifted to a point approximately 500 yards south of Lucas Creek (Potash Creek). (Trial Transcript 140-41). That part of the River, not opened in 1946 and originally closed in 1942, has remained closed until this very day. Essentially then the upper Warwick River was closed in 1942.

Again on February 26, 1962, the entire Warwick River was closed. (Trial Transcript 414). For a little over a year this remained the condition until on March 5, 1963, the river was again reopened to a point approximately 2100 yards south of Lucas Creek. (Trial Transcript 142). Thus, the 1962 closing about which the petitioners complained took an additional 1600 yards of the Warwick River when compared to the 1946 opening.

On June 20, 1965, the River was again closed with approximately the same boundaries as the 1962 closing (Trial Transcript 143). On July 12, 1965, that closing was lifted. On December 9, 1965, that portion of the River which had been closed on February 26, 1962, was reopened (this was approximately 1600 yards.) (Trial Transcript 143). Approximately four months later, on April 1, 1966, the 1600 yards was again closed. (Trial Transcript 143).

In 1967, with the opening of the James River Sewage Treatment Plant by HRSDC, a closing was ordered around the outfall pipe. (Trial Transcript 143). This closed area has been referred to as the buffer zone. Later, on February 28, 1968, the buffer zone was reduced in size. (Trial Transcript 143-44). The last closing of the Warwick River occurred on March 29, 1972, when the area between these two previously closed zones was also closed. (Trial Transcript 144).

The Petitioners' theory of recovery against the City of Newport News for the closings is ultimately grounded on their assertion that the City was negligent in the operation of three of its pumping stations located some five miles from navigable waters when it allowed these pumping stations to overflow.[3] When a pumping station overflowed, raw, untreated sewage spilled into a street and a ravine, which eventually ran off into a stream and made its way five miles downstream into the Warwick River[4] These overflows, according to Petitioners, were the primary cause of the high coliform counts which contributed to the decision of the State Department of Health to close the middle Warwick River in 1972 and the reason why the upper River has remained closed since 1966. (Petition 8).

On review of the record the Court will find no evidence of any negligence occurring before 1968. In point of fact, the Petitioners seem to admit as much when in response to pre-trial interrogatories they acknowledged there was no negligence on the part of the City prior to 1967.

> Q. 26. State exactly when and how this defendant's sewage pipes and facilities caused damage to your property.
>
> A. The sewage pipes in question have leaked continually since 1967.

The reasons for only four of all those closings were offered:

1. As to the 1963 closing the Director of the Bureau of Shellfish Sanitation for the State of Virginia offered the following reason for his action: "Well, as I recall it was due to unsatisfactory bacteriological conditions in the river." (Trial Transcript 135). There is no evidence in the record to explain what might have caused this unsatisfactory bacteriological condition. Certainly the

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[3] Petitioners say in their statement of facts (App. 8) that they demonstrated that part of the source of the coliforms came from lateral sewerage conduits. Not a scintilla of evidence is in the record in this regard.

[4] The Petitioners' expert explained: "Most of the Stoneybrook stations we talked about are close proximally to receiving water, and the Stoneybrook number 2—can I label this, as a guess, perhaps 50 feet from the water. Stoneybrook 1, my understanding is the overflows occur out of a manhole in the street, from which it flows to a storm sewer, and thence to the receiving waters, being Stoneybrook. (Trial Transcript 91).

cause was not the City's pumping stations as they were not in existence at that time;

2. As to the 1966 closing, a letter introduced into evidence (HRSDC Exhibit 1, Trial Transcript 145) relates that the 1966 closing was due to the increased salinity in the water and the discharge of partially treated sewage into the water;[5]
3. As to the 1967 closing, the Director explained it was for a "buffer zone" around the plant operated by HRSDC;[6]
4. As to the 1972 closing, the Director explained:

   Q. What was the 1972 closing in reference to?

   A. In 1972 we closed the river because the water quality of the coliform content of the open section did not meet the standard of 70 per hundred millimeters. It was located between two condemned areas, and consequently after consultation with the the U. S. Food and Drug Administration decided that it should be closed. (Trial Transcript 135).

Thus, the Petitioners' case against the City boiled down to demonstrating that the high coliform counts leading to the 1972 closing resulted from the City's negligence. Evidence was adduced that three pumping stations frequently backed up and overflowed. These overflows were manifested by the bubbling of sewage up through a manhole in the middle of a city street, the sewage making its way to the non-navigable feeder streams of the Warwick River, meandering down these streams to the main part of the River.

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[5] This closing cannot be attributed to the City because the overflows would be *untreated,* not partially treated, sewage.

[6] The "buffer zone" closing has no application in the Petitioners' case against the City.

After hearing the evidence, the jury was asked to respond to three "inquiries." As to each, the jury answered to the effect that:

1. The water quality of the Warwick River, which required its closure, was proximately caused by the maintenance and operation of the sewer system of the City of Newport News;
2. The city was guilty of negligence in the operation and maintenance of its sewer system as the same affected the Warwick River; and,
3. That such negligence was a proximate cause of conditions requiring the closure of the Warwick River. (Trial Transcript 577-78)[7].

The City then moved for a judgment *non obstante veredicto* on many grounds, principal of which were that (1) the evidence was insufficient to sustain the jury's findings; (2) the statute of limitations barred the plaintiff's claims; (3) the City was not given proper statutory notice; (4) the City was immune from tort liability; and (5) the evidence failed to disclose a compensable taking. Without reaching the first two contentions, the Court sustained the motion for a judgment *non obstante veredicto* on the grounds:

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[7] The Fourth Circuit's panel noted that the jury found that the "high coliform count in the Warwick River which was the reason for the 1966 and 1972 closures" was a result of the City operation of the sewer system. (App. 35). Petitioner says in its Petition that the River was closed on "March 1, 1966 when the northern Warwick was condemned because of high coliform counts." (Petition 6).

It is clear from the facts that (1) the jury was not asked about a 1966 closing; (2) the 1966 closing was no more than a four months opening of a part of the River that had been closed for four years; and (3) had nothing to do with the City. (See HRSDC Exhibits 1, A-L, Trial Transcript 145). The evidence offered for the closings would only link the last closing (1972) to the City. Accordingly, the panel's statement and the Petitioners' assertion that the 1966 closing had anything to do with the City is plainly wrong.

1. That the Petitioners were barred from recovery because the City was immune from tort liability in carrying on the governmental function of collecting sewage;

2. That the Petitioners had failed to comply with Virginia's statute requiring notice when an alleged tort is committed by the City; and,

3. That there had been no taking.

Petitioners then appealed.[8]

The Fourth Circuit's panel avoided the impact of the District Court ruling by determining that the Plaintiff's claim was one cognizable under the maritime and admiralty jurisdiction of the Court. The majority reasoned that in a maritime claim, immunity from tort liability is not an available defense either by reason of the doctrine of sovereign immunity or by the application of a State's notice requirement.

On rehearing the full Circuit held that under the principles of *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972), there was no maritime jurisdiction on these facts.

> In light of these authorities, we think it is clear that the cultivation of oysters by the plaintiffs under leases from the State of Virginia is a purely local activity subject to the laws and jurisdiction of the state, and that the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort. Our holding is, of course, a narrow one for we recognize that many activities incident to the harvesting of oysters may properly be the subject of admiralty. (App. 63-65).

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[8] The City contends that the intervening Plaintiffs are not before this Court since they did not appeal to the Fourth Circuit. See Plaintiffs' notice of appeal.

SUMMARY OF ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

Petitioners admit that the state owns the oyster beds and has the right to control when and how the beds are harvested. When a tort is committed by a municipality on dry land and the results of that tort impact on the use of the beds by the plaintiff, state law is peculiarly applicable to determine the controversy. All of the rights, duties, liabilities, and obligations of the parties are fixed by state law. The rules and concepts of admiralty have little or no application to the issues. Under this Court's ruling in *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972) when such a circumstance exists, it is clear that the wrong does not bear the required significant relationship to a traditional maritime activity.

Control over the harvesting of oysters by the State has been repeatedly recognized by the Court as early as *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855) and as late as *Puyallup Tribe* v. *Washington Game Dept.,*—U.S.—, 53 L. Ed. 2d 667 (1977). The harvesting of oysters raised by this case is not the type of maritime activity that this Court felt would give rise to maritime jurisdiction. *Executive Jet, op. cit.,* at 256.

Furthermore, there is not a maritime situs. The overflow of a pumping station on dry land, which ultimately impacts on navigable waters, does not render the appropriate maritime situs.

Even if there is admiralty jurisdiction the universal rule of state immunity to suit without its consent extends to cases of maritime and admiralty jurisdiction. *Ex Parte State of New York,* 256 W.S. 490 (1921).

The case does not involve a taking in contradistinction to the Fifth Amendment. The unanimous federal and state view is that tortious acts, if not a necessary consequence or result of a public undertaking, are not compensable under the Fifth Amendment. The facts make it clear that what is involved is a tort, not a taking.

The decision in this case was limited by the Fourth Circuit to its facts. There are no special and important reasons to grant a writ. The imprecise nature of the findings and facts in this case make it a particularly unlikely candidate for a vehicle to expound policy and principles, which is the role of the decisions of this Court.

ARGUMENT I

A Writ Should Not Be Granted Because The Fourth Circuit Was Right In Its Application Of The Law When It Held That The Negligent Operation Of A Sewage System By A Municipality Of A State Which Impacts Adversely On Oyster Beds Leased By The State To The Petitioners Should Be Governed By State Law, Not By Federal Maritime Law.

Petitioners attempt to give a restriction on the direct marketing of oysters in a small inland waterway in Virginia, a global magnitude by their rhetoric and inaccurate statement of the facts.[9] The Fourth Circuit, however, correctly perceived the local nature and character of this particular case. The Fourth Circuit recognized that the ownership of the beds, *Pollard's Lessee* v. *Hagen,* 44 U.S. (3 How.) 212 (1845), *Weber* v. *Harbor Commissioners,* 85 U.S. (18 Wall.) 57 (1873), and the right to control when and how the beds were harvested, *Smith* v. *Maryland,* 59 U.S. (18 How.) 71 (1855), *McCready* v. *Virginia,* 94 U.S. (IV Otto) 391 (1876), were matters subject to the laws and jurisdiction of the state. The petitioners recognize these principles to be true (Petition 37, 39), but say, in effect, that since navigation is involved (vessels are used to harvest the oysters) and the oyster is sold in commerce, that state law does not apply. By this logic, it would be of little moment to say the states can control the use of its oyster beds. By this reasoning, anything which happens to an oyster boat or an oysterman would be cognizable in admiralty.[10]

This case deals with a tort committed by a municipality on dry land the results of which have limited the *use* by Petitioners of the oyster beds leased from the State. What rights, duties and obligations the City has in carrying out its sewage collection responsibilities is obviously a matter of state law. What rights the oysterbed leasee has in the leasehold he obtains from the state and what restrictions are placed on the use of that leasehold are likewise matters peculiarly subject to the application of state law. The harvesting of oysters is not the type of maritime activity that this Court felt would give rise to maritime jurisdiction:

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[9] Petitioners' petition is replete with inaccuracies, which result from their attempt to make square facts fit into a round hole. For example, they talk of a ban on the harvesting of oysters (Petition 11, 14, and 16) when at best we are talking of a limitation on the direct marketing of oysters. Any suggestion that the City's act has interfered with the seeding and fattening of oysters or otherwise destroyed the oyster (Petition 19, 56) is a gross misstatement. Petitioners' know full well that their oysters grow better and bigger in contaminated waters. (See Answers to Interrogatories in Record). Even the suggestion that the oystering is done in documented vessels manned with crews (Petition 19) will find no support in the Record. In fact pre-trial discovery will show some of the Petitioners do not even own a boat. The assertion that the oysters harvested by Petitioners are placed "directly in interstate commerce" (Petition 52-53) will find no support in the Record. Perhaps the worst misstatement of all is the Petitioners' suggestion that the City released its sewage into streams feeding the Warwick River (Petition 22-23). The factual testimony of backed-up sewage coming out of a manhole in the middle of a city street gives the lie to this statement.

[10] If the City was negligent in destroying solid waste and a fire spread to oyster boats temporarily on shore for repairs, does admiralty jurisdiction attach because the use of the vessel in commerce is limited? If an oysterman is injured while swimming in navigable waters by a submerged rock, is his claim one in admiralty because he cannot fish? Obviously, the answer to these rhetorical questions is no. Yet, under the Petitioners' notion admiralty principles would obtain.

> (There must be a) relationship between the tort and traditional maritime activities, involving *navigation or commerce on navigable waters.* (*Executive Jet* at 256, Emphasis supplied).

That is all this case is about[11] and all that the Fourth Circuit has held. That result is mandated by *Executive Jet Aviation* v. *Cleveland,* 409 U.S. 249 (1972).

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.
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> Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. (Id. 269-70.)

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[11] This is not to say that the activities involved in the cultivation or harvesting of oysters cannot properly be the subject of admiralty. In many instances—for example, a collision involving an oyster boat, or injury to a crewman on board a vessel, admiralty law will apply. To that extent, oystering is as "traditionally maritime" as any other commercial activity involving the use and operation of vessels on navigable waters. *Union Oil Co.* v. *Oppen,* 501 F.2d 558 (9th Cir. 1974), on which the Petitioners rely so heavily, discusses the traditionally maritime nature of the fishing industry in this context. *Id.* at 560. But the injury complained of here—damage to shellfish beds from sewage discharges—is of a different nature, and is not related to the maritime aspects of the oyster industry.

It is likewise clear that the "rules and concepts" of admiralty will not help in solving rights, duties and obligations of the parties when a sewage overflow causes a limitation on the use of oysterbeds. Hence, it is clear that this case does not present facts to meet the *Executive Jet* burden "that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268.

Not only is it clear that there is not a traditional maritime activity, but also that there is no maritime situs. The panel held[12] that "the Warwick River in the area of the beds involved in this case is a navigable stream, subject to the ebb and flow of the tide," and accordingly the situs test was met. That formulation does not properly consider where the tort occurred. At the site of the defendants' wrong, the stream and creek are not navigable. In point of fact, the entire episode starts in the middle of a public street. It might be a different matter if the City was directly discharging its effluent into the water. That is not the case. Whether the sewage flows into a nearby field, stays in the street, or makes its way to the creek is entirely fortuitous[13] and depends on the size of the overflow, the weather conditions, etc. It is perfectly clear that this tort occurs in non-navigable water and on land and takes effect when the station overflows. The damage to the plaintiffs might take effect days, months, or even years later.

To find maritime situs in this case has the Court applying the principles of admiralty to an occurrence in the middle of a City street, five miles away from the oyster beds. If the Alaskan pipeline ruptures, with resultant oil spills in the Pacific Ocean, which ultimately make it impossible to direct market oysters in Virginia, is this Court to hold the maritime situs is where the plaintiff was damaged?

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[12] The full Circuit did not speak to this point.

[13] This Court in *Executive Jet* noted that the fortuitiveness of the incident mitigated against finding jurisdiction. *Id.* at 270. The same is true in the instant case.

It extends admiralty jurisdiction too far[14] to hold that if the results of a tort committed on dry land ultimately impact on a navigable stream that the principles of admiralty jurisdiction should be invoked to settle the controversy. Yet this would be the result if the plaintiffs' view is adopted. It is also clear that in deciding whether the City was negligent, the trier of fact would not apply a single admiralty principle. That this is true can be seen when it is noted that the same inquiry would be required if the overflow ruined a field of wheat or a crop of oysters. Admiralty principles would not assist in answering either problem.

In closing its opinion in *Executive Jet, supra,* this Court noted that, in the previous term, it had recommended that the federal courts exercise caution in determining whether to expand admiralty jurisdiction. Citing *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971), in which it had quoted the following language from *Healy* v. *Ratta,* 292 U.S. 263 (1934), the court reiterated that

> " 'The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.' " 409 U.S. 249, at 272.

Applying that principle to the facts before it in *Executive Jet,* the Court ruled that "the Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors." 409 U.S. 249, at 273.

Similarly, the City asserts that the issues present in the case at bar are properly resolvable under Virginia law. They do not require application of the traditional concepts of maritime law for their resolution, nor would the purpose of uniformity in the law governing maritime commerce be affected by requiring this case to be decided in a State court. The Fourth Circuit correctly perceived this result and the result is in complete accord with the principles of *Executive Jet.*

Even if there is admiralty jurisdiction, the result below is proper. This Court has held that the universal rule of state immunity from suit without its consent extends not only to actions at law and suits in equity, but to cases of maritime and admiralty jurisdiction as well. *Ex Parte State of New York,* 256 U.S. 490, 497 (1921).

> That a state may not be sued without its consent is a fundamental rule of jurisprudence, having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state, without consent given; not one brought

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[14] Such an extension of federal jurisdiction would be in direct conflict with recent pronouncements to the contrary. See *Askew* v. *American Waterways Operators,* 411 U.S. 325, 332-34 (1973); *Oregon* v. *Corvallis Sand and Gravel Co.,*—U.S.—, 50 L. Ed. 2d 550 (1977); *Complete Auto Transit* v. *Brady,*—U.S.—, 51 L. Ed. 2d 326 (1977); *Puyallup Tribe* v. *Washington Game Dept.,* —U.S.—, 53 L. Ed. 2d 667 (1977) *Douglas* v. *Seacoast Products,* —U.S.—, 52 L. Ed. 2d 304 (1977) is not contrary to this trend as Petitioners might argue. That case dealt with the Supremacy clause and the unequal treatment of Virginia residents and non-residents. No such issues are raised in this case.

> by citizens of another state, or by citizens or subjects of a foreign state, because of the 11th Amendment; and not even one brought by its own citizens, because of the fundamental rules of which the Amendment is but an exemplification. (citations omitted)
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> Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule.

And the point was emphasized at page 500.

> We repeat, the immunity of a state from suit in personam in the admiralty, brought by a private person without its consent, is clear.

ARGUMENT II

No Writ Should Be Granted Because The Unanimous Federal And Virginia Authority Is That Governmental Activities Negligently Carried On In The Performance Of A Public Function, Unrelated To A Deliberate Taking Or Necessary Damage To Private Property, Are Mere Tortious Acts If Not A Necessary Consequence Or Result Of The Public Undertaking And Are Not Compensable Under The Fifth Amendment Of The Constitution.

The unanimous federal view and Virginia authority is that where governmental activities are negligently engaged in or carried on in the performance of some public function or duty unrelated to a deliberate taking or necessary damage to private property, and constitute mere tortious acts, not the necessary consequence or result of some public undertaking or project, there is no compensable taking within the meaning of the Fifth Amendment. 2 *A.L.R.2d* 677, "Damage to Private Property Caused by the Negligence of Governmental Agents as 'taking,' 'damage,' or 'use' for Public Purposes in a Constitutional Sense." See, for example, *V. T. C. Lines* v. *Harlan,* 313 S.W.2d 573 (Ky. 1957); *St. Francis Drainage Dist.* v. *Austin,* 296 S.W.2d 668 (Ark. 1956); *Columbia Basin Orchard* v. *United States,* 132 F. Supp. 707 (Ct. Cl. 1955); *Sanquinetti* v. *United States,* 264 U.S. 146 (1924); *Eriksen* v. *Anderson,* 195 Va. 655, 79 S.E.2d 597 (1954).

Based on the facts of this case and the above proposition, the Petitioners' position that the negligence constituted a taking for which they must be compensated has no merit. No Court which has reviewed this issue has found any merit to this proposition of the Petitioners. See the District Court opinion (App. pp. 14-15) and the Fourth Circuit panel's decision. The full Circuit did not even think it appropriate to review the issue.

ARGUMENT III

A Writ Should Not Be Granted Because (1) There Are No Special And Important Reasons For Granting A Writ; (2) The Holding Of The Fourth Circuit Is A Limited One; And (3) The Petitioners Have Failed To Present The Case With Accuracy, Brevity And Clearness As Required By This Court's Rule 23(4).

In addition to the fact that this case is correctly decided in accordance with the applicable law and decisions of this Court, there are additional reasons for not granting a writ in this particular case. Under Rule 19 this Court notes that there should be "special and important" reasons for granting a writ of certiorari. Among those reasons are listed a conflict between Circuits, an important state question being decided contrary to state law, an important question being decided which has not been settled by this Court, and an important federal question being decided in conflict with this Court's opinion. On each of these grounds the Petitioners fall short.

The Petitioners make no claim that the instant case is decided in conflict with any other Circuit's opinion. Similarly, it is clear that this case has been decided in accordance with Virginia law. Furthermore, this is not a case where the question involved is one that has not been settled by this Court. This Court settled the questions involved in this case in *Executive Jet Aviation, op cit.*

The Petitioners would like to frame this case as being in conflict with this Court's opinion in *Executive Jet;* however, as we have previously demonstrated, this case is in complete accord with that decision. The *Puyallup Tribe, op cit.* case decided by this Court last term should put to rest the issues being raised by the Petitioners.

Furthermore, the holding of the Fourth Circuit in this case is a narrow one which that Court limited to its fact (App. 64-65). Such a decision, limited to its facts, and frankly, involving unique and peculiar facts, does not serve as a proper vehicle to expound policy and principles as is the role of the decisions of this Court.

One other ground remains which it seems to the City argues against granting a writ in this case. Under Rule 23(4) this Court notes that the failure to present a case with "accuracy, brevity and clearness" will be grounds in and of itself for the dismissal of the Petition. We believe that the Petition offered in this case would come within Rule 23(4). The mischaracterization and inaccuracy of the facts set forth by the Petitioners are disturbing. Cases in which the parties cannot agree on the facts do not make good ones to grant a review for apparent reasons. The Petitioners note in their Petition on Page 15 of its Petition that "confusion (has) accompanied this case on its journey through the courts. . . ." The City would agree with this assertion and believes that the imprecise nature of the findings and facts and the presentation of these facts and principals involved have led to this confusion. For this reason, too, it would seem appropriate not to grant a writ.

CONCLUSION

For the reasons stated herein the writ of certiorari should not be granted.

Respectfully submitted,

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